SUPREME COURT, U.S.
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In The

Supreme Court of the United States

October Term, 1997

WISCONSIN RIGHT TO LIFE, INC.,

Petitioner,

v.

GREGORY J. PARADISE, Chairman of the Wisconsin State Elections Board; JOHN NIEBLER, Vice-Chairman of the Wisconsin State Elections Board; BARBARA KRANIG, Secretary of the Wisconsin State Elections Board; MICHAEL BRENNAN, Member of the Wisconsin State Elections Board; WALTER DICKEY, Member of the Wisconsin State Elections Board; DAVID HALBROOKS, Member of the Wisconsin State Elections Board; J. CURTIS McKAY, Member of the Wisconsin State Elections Board; JUDD DAVID STEVENSON, Member of the Wisconsin State Elections Board; JAMES E. DOYLE, Attorney General for the State of Wisconsin; all in their official capacities,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI OF WISCONSIN RIGHT TO LIFE, INC.

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QUESTIONS DEALT WITH HEREIN

1. Did a panel of the Seventh Circuit err, in a 2-1 decision, by holding, contrary to the decisions of the First, Fifth, Eighth, and District of Columbia Circuits, that a First Amendment, facial overbreadth challenge to a state statute, seeking declaratory and injunctive relief, constituted a request for an advisory opinion on how the defendants state officials should enforce the statute, because the officials had not yet threatened to enforce the statute against the plaintiff?

2. This Court has held that for a case to be justiciable, the remedy must eliminate a discrete injury to the plaintiff; it need not eliminate a plaintiff's every injury. Further, the First, Eighth, and District of Columbia Circuits hold that declaring facially overbroad statutes unconstitutional will remove the chilling effect on the exercise of a plaintiff's First Amendment rights. Did a panel of the Seventh Circuit err, in a 2-1 decision, in holding that such a declaration would not redress the plaintiff's injury because potential private enforcers, some of whom have been enforcing facially overbroad statutes against similar plaintiffs, were not defendants?

LIST OF PARTIES

The names of all parties to the proceedings in the court whose judgment is sought to be reviewed appear in the caption of the case. There is no parent or subsidiary company of any party that is listed.

TABLE OF CONTENTS

Page

QUESTIONS DEALT WITH HEREIN i

LIST OF PARTIES ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES viii

OPINIONS AND ORDERS BELOW 1

STATEMENT OF JURISDICTION 1

CONSTITUTIONAL AND STATUTORY PROVISIONS AND REGULATIONS INVOLVED 1

STATEMENT OF THE CASE 2

A. Wisconsin's Definition of Political Committee In Wis. Stat. § 11.05 And Its Authorization Of Citizen Suits In Wis. Stat. §§ 11.60(5) and 11.66 2

B. The Proceedings Below 5

REASONS FOR GRANTING THE WRIT 10

I. The Seventh Circuit's Opinion Conflicts With The Decisions Of Her Sister Circuits In Holding That A First Amendment, Preenforcement, Facial Overbreadth Challenge, Is Not Justiciable Because State Officials Have Not Threatened To Enforce The Statute Against The Plaintiff, And In Holding That Declaring The Statute Unconstitutional And Enjoining Its Enforcement Will Not Redress The Plaintiff's Injuries 11

TABLE OF CONTENTS – Continued

Page

A. Consistent With The Law In Other Circuits, WRTL Challenged Wisconsin's Facially Overbroad Definition Of PAC And Its Mechanism For Private Enforcement By Prior Restraint By Seeking Prospective Declaratory And Injunctive Relief Against The Arm Of The State Entrusted With Enforcing These Provisions .. 13

B. Other Circuits Hold That All Of A Party's Injuries Need Not Be Redressable For Its Claims To Be Justiciable, And They Would Recognize That Here The Declaratory And Injunctive Relief WRTL Sought Will Redress All Its Injuries 21

II. The Seventh Circuit's Opinion Also Fails To Follow This Court's Precedent In Holding That A First Amendment, Preenforcement, Facial Overbreadth Challenge Is Not Justiciable Because The Officials Have Not Threatened To Enforce A Statute Against The Plaintiff, And In Holding That Declaring The Statute Unconstitutional And Enjoining Its Enforcement Will Not Redress The Plaintiff's Injuries ... 24

A. By Holding That WRTL's First Amendment, Preenforcement Facial Challenge Is Not Justiciable, The Seventh Circuit's Opinion Conflicts With *Virginia v. American Booksellers* 24

B. By Holding That WRTL's Claims Are Not Redressable Because A Declaration Of Facial Invalidity Would Not Protect It From Possible Enforcement By Private Parties, The Seventh Circuit's Opinion Conflicts With *Steffel v. Thompson* and *Larson v. Valente* 25

TABLE OF CONTENTS – Continued

Page

1. Declaring Wisconsin's Definition Of PAC Facially Unconstitutional Would Benefit WRTL If Private Parties Later Enforced This Statute Against It 26

2. Even If The Declaration Of Facial Unconstitutionality Would Not Benefit WRTL In Future Actions By Private Parties, Its Injury Is Still Redressable Because A Declaration And Injunction Against The State Defendants Would Remedy A Discrete Injury To WRTL, and Under *Larson v. Valente* WRTL Need Not Remedy Every Possible Injury 28

III. Does The Panel's Approach Narrow Dangerously The Window For Preenforcement Lawsuits Formed By *Ex Parte Young* And *Younger v. Harris*? 29

CONCLUSION 30

APPENDIX

Appendix A – Opinion of the United States Court of Appeals for the Seventh Circuit, dated March 13, 1998 (vacating decision of the district court with instructions to dismiss) ..... App. 1

Appendix B – Opinion of the United States District Court for the Western District of Wisconsin, dated September 17, 1997 (denying motion to dismiss for lack of justiciability, granting motion to abstain with leave to reinstate, if necessary, following adjudication of federal constitutional challenges in state court).. App. 15

Appendix C – Order of the United States Court of Appeals for the Seventh Circuit, dated April 16, 1998 (denying petition for rehearing with suggestion for rehearing en banc) ..... App. 46

Appendix D – Judgment of the United States Court of Appeals for the Seventh Circuit, dated March 13, 1998 (vacating the judgment of the district court and remanding with instructions)..... App. 47

APPENDIX – Continued

Appendix E – The First and Fourteenth Amendments to the Constitution of the United States, relevant provisions of Chapter 11, "Campaign Financing," of the Wisconsin Statutes, and Regulation 1.28 of the Wisconsin Administrative Code (State Elections Board) ..... App. 48

Appendix F – Verified Complaint, filed April 14, 1997 (without exhibits) ..... App. 58

TABLE OF AUTHORITIES

Page

FEDERAL CASES

Alleghany Corporation v. Hasse, 896 F.2d 1046 (7th Cir. 1990), *vacated as moot*, 499 U.S. 933 (1991) 29

Arkansas Right To Life State Political Action Committee v. Butler, Nos. 98-1215/1218, 1998 WL 285950 (8th Cir. June 4, 1998) 16, 22

Arkansas Right to Life State Political Action Committee v. Butler, 983 F. Supp. 1209 (W.D. Ark. 1997) 16

Brownsburg Area Patrons Affecting Change v. Baldwin, 137 F.3d 503 (7th Cir. 1998) 4, 7, 12

Brownsburg Area Patrons Affecting Change v. Baldwin, 943 F. Supp. 975 (S.D. Ind. 1996) 12

Buckley v. Valeo, 424 U.S. 1 (1976)..... *passim*

Chamber Of Commerce v. Federal Election Commission, 69 F.3d 600 (D.C. Cir. 1995).....18, 22, 23

Day v. Holahan, 34 F.3d 1356 (8th Cir. 1994) 6

Diamond v. Charles, 476 U.S. 54 (1986) 14

Doe v. Bolton, 410 U.S. 179 (1973).....26, 27

Ex Parte Young, 209 U.S. 123 (1908) 10, 29

Federal Election Commission v. Central Long Island Tax Reform Immediately Committee, 616 F.2d 45 (2nd Cir. 1980)..... 2

Federal Election Commission v. Christian Action Network, 92 F.3d 1178 (4th Cir. 1996) 2

Federal Election Commission v. Christian Action Network, 110 F.3d 1049 (4th Cir. 1997) 2

TABLE OF AUTHORITIES – Continued

Page

Federal Election Commission v. Christian Action Network, 894 F. Supp. 946 (W.D. Va. 1995) 2

Federal Election Commission v. Massachusetts Citizens For Life, Inc., 479 U.S. 238 (1986) 2, 3, 6

Federal Election Commission v. Survival Education Fund, Inc., 65 F.3d 285 (2nd Cir. 1995) 6

International Society For Krishna Consciousness v. Eaves, 601 F.2d 809 (5th Cir. 1979) ..... *passim*

Kentucky v. Graham, 473 U.S. 159 (1985) 13, 14

Kentucky Right To Life, Inc. v. Terry, 108 F.3d 637 (6th Cir. 1997) 16

KVUE, Inc. v. Moore, 709 F.2d 922 (5th Cir. 1983) 20

Larson v. Valente, 456 U.S. 228 (1982) 23, 25, 28

Lujan v. Defenders of Wild Life, 504 U.S. 555 (1992) 17

Maine Right To Life Committee v. Federal Election Commission, 98 F.3d 1 (1st Cir. 1996) 2

Maine Right To Life Committee v. Federal Election Commission, 914 F. Supp. 8 (D. Me. 1996) 2

Mobil Oil v. Attorney General Of Commonwealth Of Virginia, 940 F.2d 73 (4th Cir. 1991) 14, 15

Minnesota Citizens Concerned For Life v. Federal Election Commission, 113 F.3d 131 (8th Cir. 1997) 16, 17

New Hampshire Right To Life Political Action Committee v. Gardner, 99 F.3d 8 (1st Cir. 1996) ..... *passim*

TABLE OF AUTHORITIES – Continued

Page

North Carolina Right To Life, Inc. v. Bartlett, No. 5:96-CV-835-BO(1), 1998 WL 223716 (E.D. N.C. April 29, 1998) 4

Pembaur v. City of Cincinnati, 475 U.S. 469 (1986) 6

Roe v. Wade, 410 U.S. 113 (1973) 26, 27

Simon v. Eastern Ky. Welfare Rights Org., 426 U.S. 26 (1976) 28

Steel Co. v. Citizens for a Better Env't, 118 S. Ct. 1003 (1998) 27

Steffel v. Thompson, 415 U.S. 452 (1974) ..... *passim*

Texas Railroad Commission v. Pullman, Co., 312 U.S. 496 (1941) 7

United Food & Com. Workers Intern. v. IBP, Inc., 857 F.2d 422 (8th Cir. 1988) 17, 18

Virginia v. American Booksellers, Inc., 484 U.S. 383 (1988) 8, 12, 24, 25

Wilson v. Stocker, 819 F.2d 943 (10th Cir. 1987) 14

Wisconsin Right To Life, Inc. v. Paradise, 138 F.3d 1183 (7th Cir. 1998) ..... *passim*

Younger v. Harris, 401 U.S. 37 (1971) 10, 29

STATE CASES

Virginia Society For Human Life v. Caldwell, No. 972659, 1998 WL 312876 (Va. June 5, 1998) 4

CONSTITUTIONAL PROVISIONS

First Amendment to the Constitution of the United States ..... *passim*

Fourteenth Amendment to the Constitution of the United States 1

TABLE OF AUTHORITIES – Continued

Page

FEDERAL STATUTES

26 U.S.C. § 501(c)(4) 2

28 U.S.C. § 1254(1) 1

28 U.S.C. § 1331 5

28 U.S.C. § 1343(a) 5

42 U.S.C. § 1983 5

WISCONSIN STATUTES

Wis. Stat. § 11.01(4) 3, 6, 7, 12

Wis. Stat. § 11.01(16) 3

Wis. Stat. § 11.01(16)(a) 4

Wis. Stat. § 11.01(7)(a) 3

Wis. Stat. § 11.05 ..... 2, 3, 5, 11

Wis. Stat. § 11.60(5) 2, 4, 11

Wis. Stat. § 11.66 ..... 2, 5, 11

WISCONSIN ADMINISTRATIVE REGULATIONS

Wis. Admin. Code § ElBd 1.28(1) 12

Wis. Admin. Code § ElBd 1.28(2)(c) 12

OTHER AUTHORITIES

Black's Law Dictionary (6th ed. 1990) 3

PETITION FOR A WRIT OF CERTIORARI

Petitioner Wisconsin Right To Life, Inc. (WRTL), respectfully requests a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit.

OPINIONS AND ORDERS BELOW

The unreported order of the court of appeals denying the petition for rehearing with a suggestion for rehearing en banc is reproduced in the Appendix filed herewith ("App.") at App. 46. The opinion of the court of appeals vacating the decision of the district court is reported at 138 F.3d 1183 (7th Cir. 1998), and is reproduced at App. 1. The unreported opinion and order of the district court denying the defendants' motion to dismiss for lack of a justiciable controversy and granting their motion to abstain is reproduced at App. 15.

STATEMENT OF JURISDICTION

The court of appeals filed its opinion and judgment on March 13, 1998. App. 1, 47. WRTL timely filed a petition for rehearing. The circuit court denied this petition on April 16, 1998. App. 46. WRTL invokes this Court's jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS AND REGULATIONS INVOLVED

The First and Fourteenth Amendments to the Constitution of the United States, the relevant provisions in Chapter 11, "Campaign Financing," of the Wisconsin Statutes, and Regulation 1.28 of the Wisconsin Administrative Code, are set forth in the Appendix beginning at App. 48.

STATEMENT OF THE CASE

WRTL is a statewide, non-profit membership corporation, incorporated in the State of Wisconsin, with local chapters throughout the State. It is exempt from federal income tax under 26 U.S.C. § 501(c)(4). It is not associated with any political candidate, political party, or campaign committee. WRTL was incorporated to promote pro-life issues. Its purposes are thus to educate the public on issues relating to abortion, to restore the right to life for unborn children, and to promote the sanctity of all innocent life. While its major purpose is not to nominate or elect candidates, WRTL, as part of its educational activities, prepares and distributes materials, such as voter guides, scorecards, flyers, and editions of its newspaper, that discuss issues of public concern or set forth candidates' positions on such issues.

A. Wisconsin's Definition Of Political Committee In Wis. Stat. § 11.05 And Its Authorization Of Citizen Suits In Wis. Stat. §§ 11.60(5) and 11.66.

In *Buckley v. Valeo*, 424 U.S. 1 (1976), this Court held that under the First Amendment, government could only regulate speech that "expressly advocates the election or defeat of clearly identified candidates." *Id.* at 44 & n.52. This is the "express advocacy" test. *See also Federal Election Commission v. Massachusetts Citizens For Life, Inc.*, 479 U.S. 238, 248-249 (1986) (*MCFL*).[1] Speech that otherwise "influences"

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[1] Several federal courts have strictly interpreted the "express advocacy" test. *See Federal Election Commission v. Christian Action Network*, 894 F. Supp. 946 (W.D. Va. 1995), *aff'd*, 92 F.3d 1178 (4th Cir. 1996) (per curiam) (adopting district court opinion); *Federal Election Commission v. Christian Action Network*, 110 F.3d 1049 (4th Cir. 1997) (assessing attorneys' fees against FEC for ignoring express advocacy test); *Maine Right To Life Committee v. Federal Election Commission*, 914 F. Supp. 8 (D. Me. 1996), *aff'd*, 98 F.3d 1 (1st Cir. 1996) (per curiam); *Federal Election Commission v. Central Long Island Tax Reform Immediately Committee*, 616 F.2d 45 (2nd Cir. 1980) (en banc) (per curiam).

elections, such as by setting forth issues of public concern or candidates' positions on them – so called "issue advocacy" – is beyond government's reach. *Buckley,* 424 U.S. at 41-44. To fully protect the exercise of First Amendment rights, this Court also held that government can only regulate groups, e.g., by requiring them to register as "political committees" (PACs), if their "major purpose" is "to nominate or elect candidates." *Id.* at 78-80; *see also MCFL,* 479 U.S. at 252, n.6. If a group does not contribute to candidates, it can only be required to register as a PAC if its major purpose is to engage in "express advocacy." *Buckley,* 425 U.S. at 78-80. The "express advocacy" test thus protects speech, while the "major purpose" test protects the speaker.

Wisconsin regulates political speech by regulating the speaker. It defines a PAC (and thus which entities must register and report under Wis. Stat. § 11.05, App. 50) as, *inter alia,* two or more persons who make "disbursements." Wis. Stat. § 11.01(4). App. 48. It defines "disbursement" as, *inter alia,* "anything of value . . . made for political purposes." Wis. Stat. § 11.01(7)(a)1. App. 49. Further down the chain, Wisconsin defines "political purposes" as an act done merely for the purpose of "influencing" the election, nomination, recall, or retention of a state or local office-holder. Wis. Stat. § 11.01(16). App. 49.

Black's Law Dictionary defines "influence" as "[t]o affect, modify or act upon by physical, mental, or moral power, *especially in some gentle, subtle or gradual way.*" 779 (6th ed. 1990) (emphasis added). As the district court recognized, setting forth issues of public concern, e.g., discussing the procedure commonly known as partial birth abortion, including setting forth candidates' positions on them, certainly "affect" elections "in some gentle, subtle or gradual way." *See, e.g.,* App. 17 ("Plaintiff distributes voter guides, flyers, scorecards, and press releases to its members and the general public. These materials influence elections by setting forth candidates' positions on issues of public importance."). Thus, Wisconsin defines groups as PACs not if they engage in

"express advocacy" (by "expressly advocating the election or defeat of clearly identified candidates"), but if they engage in "issue advocacy" (by "influencing elections"). The PAC definition in fact confirms that "influencing elections" encompasses more than express advocacy: "Acts which are for 'political purposes' include *but are not limited to* [t]he making of a communication which expressly advocates the election, defeat, recall or retention of a clearly identified candidate" Wis. Stat. § 11.01(16)(a) (emphasis added).[2] App. 49-50.

Wisconsin authorizes any citizen to enforce its definition of PAC (and the attendant registration and reporting requirements) by suing for injunctive relief. Wisconsin Stat. § 11.60(5) provides that "any elector may file a verified petition with the [election] board or the appropriate district attorney or both . . . requesting that civil action . . . be

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[2] Courts have recognized that statutes that define groups as PACs for engaging in speech that "influences elections" violate the express advocacy test and thus are facially overbroad. *See Virginia Society For Human Life v. Caldwell*, No. 972659, 1998 WL 312876, at * 3 (Va. June 5, 1998) (answering certified question from United States Court of Appeals for the Fourth Circuit) ("[I]t is readily apparent that absent a narrowing construction of the phrase 'for the purpose of influencing the outcome of an election' as used by the General Assembly in the statutes in question, these statutes would apply to individuals and groups that engage solely in issue advocacy, and, thus, would be unconstitutionally overbroad."); *North Carolina Right To Life, Inc., v. Bartlett*, No. 5:96-CV-835-BO(1), 1998 WL 223716, at * 4 (E.D. N.C. April 29, 1998) (statute defining groups that seek "to influence or attempt to influence the result of an election" as PACs regulates groups engaging only in issue advocacy. "This violates the First Amendment, as construed by the Supreme Court in *Buckley v. Valeo*. . . . By this standard, [the statute] is fatally overbroad: it does not limit its coverage to entities engaging in issue advocacy."); *Brownsburg Area Patrons Affecting Change v. Baldwin*, 137 F.3d 503 (7th Cir. 1998) (certifying question to state supreme court of whether statute that defined PACs as groups that spend money "to influence the election of a candidate" could be narrowly construed to avoid problem of facial overbreadth.).

brought against any person, committee or group [for a violation of Chapter 11]." App. 53. If the Board fails to act, then under Wis. Stat. § 11.66, the "elector may sue for injunctive relief to compel compliance with [Chapter 11]." App. 55. Wisconsin, then, authorizes its citizens to impose prior restraints on political speech.

B. The Proceedings Below

The plain language of Wisconsin's definition of PAC and its citizen suit provision chills the exercise of WRTL's issue advocacy. App. 78, ¶ 42. Administrative and civil court actions which the Wisconsin State Elections Board (the Board) and private citizens, respectively, brought against similar groups for engaging in similar speech, underscores this chill. App. 71-72, ¶¶ 23-26. The Board ruled that these groups were PACs under Wis. Stat. § 11.01(4), and it ordered them to register as such pursuant to Wis. Stat. § 11.05. App. 19-20; *Wisconsin Right To Life, Inc. v. Paradise*, 138 F.3d 1183, 1185-1186 (7th Cir. 1998) (*WRTL*) (App. 5-7). Also, private citizens obtained injunctions, which Wisconsin's appellate court affirmed, barring these groups from engaging in issue advocacy until they registered as PACs. App. 19; *WRTL*, 138 F.3d at 1187 (App. 9-10).

On April 14, 1997, and pursuant to 42 U.S.C. § 1983 and 28 U.S.C. §§ 1331 and 1343(a), WRTL brought First Amendment, preenforcement, facial challenges to the PAC definition and the citizen suit provision. App. 61, 63. It did so, in accordance with the Eleventh Amendment, by suing the Wisconsin officials who administer and enforce Wisconsin's election laws in their official capacities: the Attorney General and officers and members of the Board. App. 65-66. WRTL alleged that the PAC definition improperly regulated issue advocacy groups, and that the citizen suit provision was an

unconstitutional prior restraint on political expression.[3] App. 61, 79-87. It sought a declaration that these statutes were facially unconstitutional and an injunction against the defendants enforcing them. App. 59, 63, 81-85, 87.

On September 16, 1997, the United States District Court for the Western District of Wisconsin denied the Board's motion to dismiss for lack of a justiciable controversy. App. 44-45. The court noted that WRTL "believes Wisconsin campaign financing law requires that it . . . must register as a [PAC]." App. 20. It also noted that WRTL did not want to do so because of the resultant burdens. App. 20. The district court implicitly recognized that recent administrative and civil enforcement actions underscored WRTL's fear that it was a PAC under Wis. Stat. § 11.01(4) and would be required to register as such, or face civil and criminal penalties and/or the prior restraint of its speech. App. 20 ("Plaintiff believes that the materials it prepares and distributes are identical to the materials prepared and distributed by the organizations now required to register as committees.").

As a result, it held that WRTL had standing to challenge these statutes, and that its claims were ripe for adjudication. App. 16, 27-35. In doing so, the district court recognized that

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[3] WRTL also challenged Wis. Stat. § 11.38(1)(a)1's prohibition on corporate independent expenditures for not exempting not-for-profit, ideological corporations. *MCFL*, 479 U.S. at 264; *Federal Election Commission v. Survival Education Fund, Inc.*, 65 F.3d 285, 292-293 (2d Cir. 1995); *Day v. Holahan*, 34 F.3d 1356, 1363-65 (8th Cir. 1994). App. 61-62, 87-90. It challenged Wis. Stat. § 11.06(2), which requires groups that are not organized primarily for political purposes to report all expenditures for express advocacy, for not exempting expenditures made on a regularly published newspaper. *See generally* 2 U.S.C. § 439(9)(B)(i) and *MCFL*, 479 U.S. at 250. App. 62, 96-98. Also, it alleged that, independent of the facial invalidity of the PAC definition, the Board's requiring issue advocacy groups to register as PACs was an unconstitutional policy, under *Pembaur v. City of Cincinnati*, 475 U.S. 469, 479-480 (1986). App. 61, 84-85. Finally, it challenged the PAC definition and citizen suit provisions with respect to a possible recall election that has now been rendered moot. App. 62-63, 90-96.

WRTL sought declarations that the PAC definition and citizen suit provisions were unconstitutional and sought injunctions against their enforcement. App. 16 ("This is a civil action for declaratory and injunctive relief in which plaintiff seeks to enjoin defendants from enforcing various provisions of Wisconsin's campaign financing laws. Wis. Stat. Ch. 11. In addition, plaintiff asks this court to declare that these same provisions violate the First Amendment of the United States Constitution."). The court, however, granted the Board's motion to abstain under *Texas Railroad Commission v. Pullman, Co.*, 312 U.S. 496 (1941), finding that state courts might construe Wis. Stat. § 11.01(4) so that it did not encompass issue advocacy. App. 16, 35-45.

WRTL appealed. On March 13, 1998, a panel of the United States Court of Appeals for the Seventh Circuit, in a 2-1 decision authored by Judge Easterbrook, vacated the district court's opinion and remanded the case with instructions to dismiss for lack of a justiciable controversy. *WRTL*, 138 F.3d at 1188 (App. 11, 47). It held that WRTL really sought an advisory opinion, where a federal court would "instruct the defendants that the state court will (á la *Buckley*) or must (á la *Massachusetts Citizens for Life*) treat the state's law as inapplicable to candidate comparisons and other forms of implicit advocacy. . . . " *Id.* at 1185 (App. 3). In this regard, the panel concluded that the defendant state officials were not injuring WRTL because *they* had not threatened to enforce the PAC definition against WRTL.

> No one has threatened WRTL with sanctions or ordered it to register as a [PAC]. . . . No one has sued WRTL under the citizen suit provisions. . . . Nonetheless, claiming to fear the consequences of registration should it continue its former ways, WRTL curtailed its program of voter education and filed this suit. . . . [U]nlike the plaintiff in *Brownsburg Area Patrons Affecting Change v. Baldwin*, 137 F.3d 503 (7th Cir. 1998), an otherwise-similar case in Indiana, WRTL is not now threatened by any application of Wisconsin's law.

WRTL, 138 F.3d at 1184-1185 (App. 2-4). As a result, the panel held that WRTL's claimed chilling effect was not objectively reasonable.

> It dreads . . . a possibility [that the state defendants will enforce the statute against it], and "actual and well-founded fear that the law will be enforced against" a group can make a claim justifiable even if enforcement lies in the future. *Virginia v. American Booksellers*, 484 U.S. 383, 393 (1988). We may assume that WRTL has genuine apprehension about what lies ahead. But is its concern objectively "well-founded"? If not, Article III of the Constitution precludes a federal court from ruling.

Id. at 1185 (App. 4). Finally, it held that WRTL's claims for relief were not redressable because private citizens, whom the court viewed as the real source of WRTL's injuries, *id.* at 1187 (App. 9) ("But, as the district court perceived, the real threat is not from the Board but from the private action authorized by Wis. Stat. §§ 11.60, 11.66."), were not also parties.[4]

> Only the parties need respect a decision by an inferior federal court. Yet the candidates who filed the state cases are not parties to this one. Neither are the state judges – nor could they be made parties. The only defendants are the Attorney General and members of the Board. Against them alone would relief run. If sued in state court by candidates offended by its flyers, brochures, or ads, WRTL could not plead a federal judgment as a defense; the candidates not parties to the federal case, would not be bound by the outcome. Potential injury from

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[4] The panel did not address the justiciability of WRTL's challenge to the citizen suit provision or its other challenges. *See* footnote three, *supra*.

> decisions by state courts in private litigation is not redressable by any order that could be issued [here].

id. at 1187 (App. 10) (internal citations omitted).[5]

In his dissent, Judge Flaum criticized the panel for misanalyzing WRTL's claims and the effect of its requested relief. *WRTL*, 138 F.3d at 1138-1139 (dissenting opinion of Flaum, J.) (App. 11-14). He noted that a preenforcement, facial challenge to state statutes seeking declaratory and injunctive relief is not a request for an advisory opinion, where a federal court instructs state officials how to enforce their statutes.

> I respectfully suggest that this analysis, although internally consistent, rests on a faulty premise. WRTL asked the district court to declare the Wisconsin statute (or portions thereof) unconstitutional on its face and, furthermore, to enjoin enforcement of the law. Striking down the statute as unconstitutional on its face would not require this Court to issue an advisory opinion about how Wisconsin courts should interpret *Buckley* and *Massachusetts Citizens for Life* in various cases against third parties, as the Majority fears.

Id. at 1188 (App. 11-12) (footnote omitted). He concluded that declaratory and injunctive relief would redress WRTL's injuries as to private parties who were not defendants. *Id.* (App. 12-13) ("If the statute were declared unconstitutional, there would be no valid enactment for the state courts to interpret. Moreover, striking down the citizen suit provisions as unconstitutional would effectively put an end to such suits altogether, which would seem to obviate the Majority's redressability concern.").

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[5] *See also id.* at 1185 (App. 4) ("Moreover, WRTL has standing only if the harm in prospect can be redressed by the relief it seeks. 'Redressability' is an insurmountable hurdle for WRTL, as we shall see."); *id.* 1186 (App. 7) ("We think that this shows why the relief WRTL seeks [i.e., against the state defendants] is unrelated to the real problems it confronts [i.e., the prospect of private party enforcement].").

On April 16, 1998, the Seventh Circuit denied WRTL's petition for rehearing and a suggestion for rehearing en banc. App. 46. This petition for a writ of certiorari followed.

REASONS FOR GRANTING THE WRIT

WRTL respectfully petitions the Court for a writ of certiorari because the panel has made it much more difficult for federal courts in the Seventh Circuit to hear preenforcement challenges to unconstitutional state statutes. Contrary to the decisions of this Court and the law in at least four federal circuits, the Seventh Circuit has ruled that the government must expressly threaten to enforce an unconstitutional statute against a plaintiff, or perhaps even be investigating him prepatory to enforcing it, for the plaintiff to have a justiciable controversy. The Seventh Circuit has also held that declaring a statute facially unconstitutional and enjoining its enforcement will not redress a plaintiff's injuries because these remedies will not protect the plaintiff from future lawsuits by other parties. This holding, too, violates the law in other circuits and is inconsistent with the decisions of this Court. The troubling upshot of the Seventh Circuit's approach is that it dangerously narrows *Ex Parte Young's* window for bringing preenforcement lawsuits in federal court before this window is slammed shut by a state enforcement proceeding and the abstention doctrine of *Younger v. Harris*. To resolve the Seventh Circuit's conflict with her sister circuits and to ensure access to the federal courts, the petition should be granted.

Conflict Among The Circuits

I. The Seventh Circuit's Opinion Conflicts With The Decisions Of Her Sister Circuits In Holding That A First Amendment, Preenforcement, Facial Overbreadth Challenge, Is Not Justiciable Because State Officials Have Not Threatened To Enforce The Statute Against The Plaintiff, And In Holding That Declaring The Statute Unconstitutional And Enjoining Its Enforcement Will Not Redress The Plaintiff's Injuries.

The Seventh Circuit acknowledged that the PAC definition in Wis. Stat. § 11.05 is extremely broad for including as PACs groups that engage only in issue advocacy: it correctly described the statute as "requir[ing] almost any group that wants to say almost anything about a candidate or election to register as a political committee." *WRTL*, 138 F.3d at 1184 (App. 3). And it implied that the citizen suit provisions in Wis. Stat. §§ 11.60(5) and 11.66 are unconstitutional prior restraints on speech. *Id.* at 1187 (App. 9). The panel noted that the Board had recently enforced the PAC definition in agency proceedings against groups that were not engaging in express advocacy, *id.* at 1185-1186 (App. 6-7), and thus in accord with the statute's overbreadth. It also noted that private citizens had recently and repeatedly invoked the citizen suit provisions to enforce the PAC definition in state court and had obtained prior restraints of political speech that Wisconsin's appellate court affirmed. *Id.* at 1187 (App. 9-10). The panel thrice observed that in light of these facts, WRTL was in a precarious position. *Id.* at 1186 (emphasis added) ("[T]he Board's order does not give any reasons, and this is not the only *weasel word* in the preceding sentence. . . . Its decision tells the advertisers that if they do not register and provide the information required of [PACs] then 'their records will be subpoenaed.' "); *id.* at 1187 ("None of this is to deny that WRTL's concerns are genuine. The Board's decision in

Travis was not exactly reassuring. . . . "); *id.* ("This puts WRTL to a hard choice.").[6]

But because WRTL – unlike the plaintiff in *Brownsburg Area Patrons Affecting Change v. Baldwin*, 137 F.3d 503 (7th Cir. 1998) (*BAPAC*), "an otherwise similar case in Indiana," *WRTL*, 138 F.3d at 1185 (App. 3-4) – "is not now threatened by any application of Wisconsin's law,"[7] *id.*, the panel concluded that it is not injured. In BAPAC, some of the government defendants had expressly threatened the plaintiff with enforcement, and had in fact begun investigating it for engaging in issue advocacy without registering as a PAC. *See Brownsburg Area Patrons Affecting Change v. Baldwin*, 943 F. Supp. 975, 980-981 (S.D. Ind. 1996). The Seventh Circuit implicitly found that the plaintiff had standing, and the district court expressly found that it did. *BAPAC*, 943 F. Supp. at 982-984. Thus, contrasting WRTL's plight with that of BAPAC, the panel in this case defined "threat of enforcement" as an *express* threat. Because the specific state defendants had not expressly threatened WRTL, the panel concluded that they were not injuring it. *WRTL*, 138 F.3d at

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[6] Notwithstanding these observations, the panel's comfort level about possible enforcement against WRTL was apparently increased by an Attorney General opinion and a Board regulation. *Id.* at 1185. The Attorney General's opinion, however, does not bind Wisconsin courts. As a result, it is insufficient to remove the chill on the exercise of WRTL's First Amendment rights. *Virginia v. American Booksellers, Inc.*, 484 U.S. 383, 395 (1988) ("as the Attorney General does not bind the state courts or local law enforcement agencies, we are unable to accept her interpretation of the law as authoritative.") And the regulation is inapposite. It provides that groups that are *not* PACs only have to report their express advocacy expenditures. Wis. Admin. Code § ElBd 1.28(2)(c). The problem here, however, is that WRTL *is* a PAC under both Wis. Stat. § 11.01(4) *and* the regulation, § ElBd 1.28(1), because both define groups as PACs in terms of influencing elections – the very language that WRTL contends is facially overbroad – and most, if not all, of WRTL's activities "influence elections."

[7] Judge Easterbrook, the author of the opinion in this case, was also a member of the panel that decided *BAPAC*.

1183-1185 (App. 2-4). As a result, it held that WRTL was asking for an advisory opinion with respect to these defendants. *Id.* at 1186-1187 (App. 8-9). Further, the real threat (or injury) to WRTL, according to the panel, is from unnamed – and perhaps unknowable – private persons. *Id.* at 1187 (App. 9) ("the real threat is not from the Board but from . . . private actions. . . . "). Because these persons are not, and maybe could not be, parties to the case, the panel held that WRTL's injury was not redressable. *Id.* (App. 10-11).

A. Consistent With The Law In Other Circuits, WRTL Challenged Wisconsin's Facially Overbroad Definition Of PAC And Its Mechanism For Private Enforcement By Prior Restraint By Seeking Prospective Declaratory And Injunctive Relief Against The Arm Of The State Entrusted With Enforcing These Provisions.

By enacting facially unconstitutional statutes, *the State of Wisconsin* has chilled the exercise of WRTL's First Amendment rights. WRTL sought declaratory and injunctive relief to remove this chill. Because of the Eleventh Amendment, it sought this relief by suing, in their official capacities, the state officials who are responsible for administering and enforcing the provisions at issue.[8] But contrary to the Seventh Circuit's belief, suing such officials prior to enforcement of a statute does not amount to asking a federal court to advise these officials how to enforce their statutes on a case-by-case basis. For also contrary to that Court's belief, when a statute

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[8] The Eleventh Amendment prohibits suits against a state or its agencies. *Kentucky v. Graham*, 473 U.S. 159, 167 (1986). As a result, citizens cannot sue states directly to prevent overbroad laws from being enforced against them. *Id.* at 167 n.14 ("[A] State cannot be sued directly in its own name regardless of the relief sought."). Citizens must sue state officials in their official capacities because "[i]n an injunctive or declaratory action . . . , the State's immunity *can* be overcome by naming state officials as defendants." *Id.* at 169 n.18.

proscribes protected speech, the defendant state officials are not injuring the plaintiff, rather the statute is; the defendant officials are simply a proxy for suing the State.

While for Eleventh Amendment purposes, "when a plaintiff seeks a declaration that a particular statute is unconstitutional, the proper defendants are the government officials charged with administering and enforcing it," *New Hampshire Right To Life Political Action Committee v. Gardner,* 99 F.3d 8, 13 (1st Cir. 1996), this does not change the fact that the injury stems from the statute, *id.* ("the injury can be traced to the existence and threatened enforcement of the challenged statutes."), and ultimately to the state which enacted it. *Mobil Oil v. Attorney General of the Commonwealth of Virginia,* 940 F.2d 73, 76 n.2 (4th Cir. 1991) (emphasis added) ("we think a dispute *with a state* [over an unconstitutional statute] suffices to create a dispute with the state's enforcement officer sued in a representative capacity.") As the Tenth Circuit put it:

> "[a] suit against a state officer in his official capacity is, of course, a suit against the State." Thus a controversy exists not because the state official is himself a source of the injury, but because the official represents the state whose statute is being challenged as the source of the injury.

Wilson v. Stocker, 819 F.2d 943, 947 (10th Cir. 1987) (quoting *Diamond v. Charles,* 476 U.S. 54, 57 n.2 (1986)); quoted in *Mobil Oil,* 940 F.2d at 76 n.2. *See also Kentucky v. Graham,* 473 U.S. 159, 165-166 (1985). Contrary to the panel's belief here, seeking prospective relief as to state officials who have made no effort to enforce an unconstitutional statute against a plaintiff is not "the paradigm of an advisory opinion." *WRTL,* 138 F.3d at 1187 (App. 9). Rather, this Court has held that "[t]he conflict between state officials empowered to enforce a law and private parties subject to prosecution under that law is a classic case or controversy within the meaning of Article III." *Charles,* 476 U.S. at 64.

Indeed, the Fourth Circuit has stated that the law should *encourage* a plaintiff to sue the state officials charged with

administering and enforcing an unconstitutional statute before they enforce it against him.

> Public policy should encourage a person *aggrieved by a law* he considers unconstitutional to seek a declaratory judgment *against the arm of the state entrusted with the state's enforcement power*, all the while complying with the challenged law, rather than to deliberately break the law and take his chances in the ensuing suit or prosecution.

Mobil Oil, 940 F.2d at 75 (emphasis added).

In concluding that WRTL has no dispute with (or is not injured by) the state defendants, the panel erred in focusing on what these officials did not (yet) do to WRTL, as opposed to *what the statutes* did to it: chill its speech. Moreover, by confining a reasonable "threat" to the exercise of First Amendment rights – for purposes of determining the "chilling effect" on it – to situations in which state defendants expressly threaten to enforce a statute, the panel's opinion conflicts with recent decisions of the First, Fifth, Eighth, and District of Columbia Circuits. Unlike the panel here, these circuits do not require that a state expressly threaten a plaintiff with a prosecution or investigate him as a precursor to one in order for justiciable controversy to arise. Rather, they *presume* that such statutes "threaten" (or injure) the party whose protected speech they proscribe (and create a justiciable controversy) if they: 1) on their face, proscribe or regulate protected expression in which a plaintiff normally engages; and 2) are in fact causing the plaintiff to cease engaging in such expression (or to alter his activities from how he would otherwise conduct them) for fear of incurring civil or criminal penalties. In such a situation, these circuits *presume* that the plaintiff's allegations of chill are objectively reasonable.

Gardner illustrates this approach perhaps most clearly. Upon surveying decisions of this Court and other circuits, the First Circuit stated that the standard for determining whether there is a "credible threat of prosecution," and hence whether a chill is reasonable, "is quite forgiving." 99 F.3d at 14. It then succinctly set forth the test:

> The preceding cases make clear that when dealing with pre-enforcement challenges to recently enacted (or, at least, non-moribund) statutes that facially restrict expressive activity by the class to which the plaintiff belongs, courts will *assume* a credible threat of prosecution in the absence of compelling contrary evidence.

Id. at 15 (emphasis added).[9]

Other federal circuits either expressly or effectively follow this test. Most recently, in *Arkansas Right To Life State Political Action Committee v. Butler,* Nos. 98-1215/1218, 1998 WL 285950, at * 2 (8th Cir. June 4, 1998) (*ARLPAC*), *aff'g, Arkansas Right to Life State Political Action Committee v. Butler,* 983 F. Supp. 1209 (W.D. Ark. 1997), the Eighth Circuit held that the plaintiff had standing to mount a First Amendment, preenforcement challenge to portions of Arkansas' campaign finance laws, even though the state had not expressly threatened the plaintiff with enforcement. Citing *Gardner* and its own decision last year in *Minnesota Citizens Concerned for Life v. Federal Election Commission,* 113 F.3d 129 (8th Cir. 1997) (*MCCL*), the Eighth Circuit found that the plaintiff was injured because the provisions it challenged encompassed activity in which it wanted to engage:

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[9] "*Compelling* contrary evidence" exists if overbroad statutes are amended to remove their overbreadth, *Kentucky Right To Life, Inc., v. Terry,* 108 F.3d 645 (6th Cir. 1997) ("Given these amendments, there is no possibility now that the statute's pre-[1996] form will be applied . . . to [KRL] or will chill the rights of others."), or if a state court authoritatively construes them so that they do not encompass protected speech. *BAPAC,* 137 F.3d at 509 ("BAPAC acknowledges that the federal courts are unable to provide an authoritative reading of the [state] statute. . . . [As a result, state enforcement] authorities . . . would not be bound by our determination . . . Accordingly, we provide the state court with the opportunity to make a definitive ruling on this issue."). See footnote six, *supra,* for why there was no "*compelling* contrary evidence" in this case.

> Plaintiffs . . . are not required to expose themselves to arrest or prosecution under a criminal statute in order to challenge a statute in federal court. *See New Hampshire Right to Life Political Action Committee v. Gardner*, 99 F.3d 8, 13 (1st Cir. 1996). Instead, "*when government action or inaction is challenged by a party who is a target or object of that action . . . 'there is ordinarily little question that the action or inaction has caused him injury. . . .'*" *Minnesota Citizens Concerned for Life v. Federal Election Commission*, 113 F.3d 129, 131 (8th Cir. 1997), quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561-562 (1992).

ARLPAC, 1998 WL 285950, at * 2 (emphasis added).

While *Arkansas Right To Life State Political Action Committee* is the Eighth Circuit's most recent pronouncement on presuming injury or a credible threat of prosecution from proscriptive statutory language, *United Food & Commercial Workers International v. IBP, Inc.*, 857 F.2d 422 (8th Cir. 1988), may be its best. There, the Eighth Circuit rejected the Defendants' argument that "there is no actual or threatened injury . . . because no picketers were arrested, prosecuted, or threatened with prosecution during the [plaintiff's] most recent picketing activities, even though violations of the . . . provision [at issue] occurred. . . ." *Id.* at 427. It stated that "past arrests *or threats of arrest*, while relevant, are *not* necessary to establish the justiciability of plaintiff's claim . . . ." *Id.* at 427-428 (emphasis added). It noted that courts had found standing (and implicitly an injury) simply from the presence of proscriptive statutory language that encompasses a plaintiff's activities.

> Where plaintiffs allege an intention to engage in . . . conduct arguably affected with a constitutional interest which is clearly proscribed by statute, courts have found standing to challenge the statute, *even absent a specific threat of enforcement.*

Id. at 428 (emphasis added). It then neatly summed-up the essence of the "threat" from plainly proscriptive provisions – a threat that exists without any official's warning:

> where the enforcement of a regulatory statute would cause plaintiff to sustain a direct injury, the action may be properly maintained, whether or not the public official has "threatened" suit; *the presence of the statute is threat enough,* at least where the challenged statute is not moribund.

Id. (emphasis added).

In *Chamber Of Commerce v. Federal Election Commission,* 69 F.3d 600, 603 (D.C. Cir. 1995), the District of Columbia Circuit adopted, in practice, this approach. The Court held that the Chamber of Commerce possessed standing to challenge, preenforcement, a Federal Election Commission (FEC) rule, even though the FEC had not decided to enforce the rule against it, because the rule governed the Chamber's activities, and as a result, the Chamber was forced to alter them. In concluding that the Chamber thus faced a credible threat of prosecution, the Court noted that it "must bear in mind also that appellants claim that the rule infringes on their First Amendment rights." *Id.* In such a case, "[a] party has standing to challenge, preenforcement, . . . the constitutionality of a *statute* if First Amendment rights are arguably chilled. . . . " *Id.* (emphasis in original).

Finally, the circuit court case which may have had the most impact on the formulation of the "presumptive" threat doctrine is the Fifth Circuit's 1979 decision in *International Society For Krishna Consciousness v. Eaves,* 601 F.2d 809 (5th Cir. 1979) (both the First Circuit in *Gardner* and the Eighth Circuit in *IBW* cited it). The *Eaves* Court stated that to determine whether there is a chill, courts "must focus on the plaintiff's interest in 'engaging in a course of conduct, arguably affected with a constitutional interest, but proscribed by a statute.' " 601 F.2d at 819. If a plaintiff has an independent interest (apart from a general desire to redress constitutional violations) in engaging in acts which a law prohibits, it is

most likely that the law chills the exercise of his constitutional rights.

> While many varieties of plaintiffs can qualify to raise *anticipatory* claims, the Supreme Court has been *most willing* to allow [such] claims by plaintiffs who allege that they wish to violate the challenged statute *because of their active membership in some . . . organization that has goals apart* from the extirpation of unconstitutional measures.

Id. (emphasis added).

The *Eaves* Court noted that "the reasons for [this rule] are clear." *Id.*

> If we are to be faithful to the premise derived from *Marbury v. Madison,* we cannot always be satisfied by a plaintiff's formal allegation that he wished to violate the challenged statute, for such an allegation could be honestly made by a plaintiff interested only in sweeping unconstitutional legislation from books. But [w]e can be *most certain* that a constitutional challenge grows out of genuine dispute – and is not a contrivance prompted by a desire to enforce constitutional rights – if we know that *the allegedly unconstitutional statute interferes with the way the plaintiff would normally conduct his affairs.* Of course anticipatory challenges should be allowed in a variety of other circumstances. *But usually it is sufficient, although not always necessary,* that *the plaintiff have a role in an organization dedicated to activities proscribed by the challenged statute and assertedly protected by the Constitution.*

Id. (emphasis added).

In terms of chilling effect, "*any* probability of enforcement, however small, may deter even a genuinely interested plaintiff, . . . [for] a conscientious citizen may be unwilling to break any law that has not been repealed or invalidated, even if he believes it to be unconstitutional." *Id.* (emphasis added). Thus, to demonstrate a probability of enforcement, parties "need cross only a *low threshold*; the Supreme Court requires

no more than a credible threat of prosecution." *Id.* (emphasis added). *Eaves* stated that a "credible threat" exists if a statute proscribes activities in which a plaintiff seeks to engage.

In *Eaves*, the International Society For Krishna Consciousness (hereafter "the Society") challenged a regulation banning distributing literature and soliciting funds at airports. *Id.* at 815. Because of its beliefs, the Society's members had a duty to engage in these activities. *Id.* at 817. The Fifth Circuit found that the Society crossed the "low threshold" of a credible threat of enforcement, even though "no one ha[d] ever been charged with violating the ordinance, and it ha[d] never been applied or interpreted by any state court," *id.* at 815, because the regulation proscribed protected activities in which it earnestly wanted to engage (though it had not yet engaged in them), and the Society altered its activities to avoid violating the regulation. *Id.*

Because of these facts, the Court termed "appellants' interest in bringing these anticipatory claims jurisdictionally impeccable." *Id.* at 820.

> [T]he Society's members are under a religious duty to distribute literature, solicit funds, and proselytize. The Society asserts, without contradiction, that at other times and at other places it aggressively solicited funds and distributed literature. . . . Plainly, appellants have an interest in escaping the [regulation] and *in knowing exactly how far they can go without being punished* that is *independent* of any desire to enforce the Constitution.

Id. The Court rejected the State's argument that there is no injury – "and therefore no case or controversy" – because of a lack of enforcement. *Id.* at 823; *see also KVUE, Inc. v. Moore*, 709 F.2d 922, 930 (5th Cir. 1983) ("that the statute has not been enforced and that there is no certainty that it will be does not establish the lack of a case or controversy"). While "[t]his argument is abstractly persuasive . . . [it] is insufficiently sensitive to the first amendment interests at stake here, and it does not take account of the practical difficulties faced by any group like the Society." *Id.* at 823-824.

> The appellants are entitled to exercise their first amendment rights vigorously and aggressively and to go to the limits of the law in [doing so]. One who goes to the limits, of course, is more likely to transgress them inadvertently than one who leaves some margin. [Furthermore,] [o]ne who goes to the limits is also more likely to be thought to have transgressed them even if he or she has not. The threat [i.e., possibility] of severe punishment, therefore, is likely to deter . . . the Society from pressing their religious views as forcefully as they otherwise might; it is likely to induce them to leave some room for error.

Id. at 824.

By holding that WRTL is not injured because the state defendants in this case have not expressly threatened to enforce the PAC definition against it, the Seventh Circuit's opinion conflicts with the aforementioned decisions of the First, Fifth, Eighth, and District of Columbia Circuits. The petition should be granted to resolve the conflict over what constitutes a "credible threat of enforcement" for purposes of a cognizable injury under Article III of the Constitution.

B. Other Circuits Hold That All Of A Party's Injuries Need Not Be Redressable For Its Claims To Be Justiciable, And They Would Recognize That Here The Declaratory And Injunctive Relief WRTL Sought Will Redress All Its Injuries.

The panel here did not hold that WRTL's requested declaration and injunction would not remedy its injuries that stemmed from the state (or more specifically, its statute). For the panel did not believe that Wisconsin was injuring WRTL at all. *WRTL,* 138 F.3d at 1183-1185 (App. 2-4). Instead, the panel held that WRTL's "real problems," *id.* at 1186 (App. 7) – its fear of prosecution from private parties – were not redressable because private citizens were not defendants. *Id.* at 1186-1187 (App. 8-11). Thus, it reasoned, a declaration of facial unconstitutionality would not benefit WRTL if these

private parties enforced Wisconsin's PAC definition against it in the future. *Id.* at 1187 (App. 10-11). And it implicitly concluded that for WRTL's claims to be justiciable, its requested relief *must* redress such injuries.

The panel's three conclusions about redressability conflict with those of her sister circuits. First, and as noted, other circuits recognize that, by enacting facially overbroad statutes, a state injures the "targets" of those statutes. *See ARLPAC*, 1998 WL 285950, at * 2 ("when government action [such as by enacting an unconstitutional statute] . . . is challenged by a party who is a target or object of that action . . . there is ordinarily little question that the action . . . has caused him injury") and cases in Part I.A., *supra*. They also recognize that declaring such statutes unconstitutional and enjoining the state from enforcing them will redress a plaintiff's injuries that are due to the state. *See ARLPAC*, 1998 WL 285950, at * 2 ("a judgment preventing . . . the [future] action will redress it."); *Gardner*, 99 F.3d at 13 ("That injury is also redressable in this action: when a plaintiff seeks a declaration that a particular statute is unconstitutional, the proper defendants are the government officials charged with administering and enforcing it."). Thus, under the approach of these courts, the declaratory and injunctive relief WRTL sought would remedy its state-inflicted injuries.

Second, under the approach of the District of Columbia Circuit, the chilling effect on the exercise of WRTL's rights that stemmed from possible enforcement by *private parties* would be redressed if a court declared the PAC definition and citizen suit provisions unconstitutional. In *Chamber of Commerce*, as noted, the Court held that the Chamber possessed standing to challenge a FEC rule, even though the agency had not decided to enforce the rule against it. 69 F.3d at 603. One factor that reinforced to the Court that the Chamber had standing was that private persons, *who were not parties to the case*, could enforce the regulation against the Chamber in the future, and this possibility chilled the exercise of its First Amendment rights. *Id.* In reaching its conclusion, the Court

implicitly held that declaratory relief would provide at least some redress for the Chamber's injuries with respect to private parties, although they were not in the suit. In this case, Judge Flaum expressly concluded as much: "If the [PAC definition] were declared unconstitutional, there would be no valid enactment for the state courts to interpret. Moreover, striking down the citizen suit provisions as unconstitutional would effectively put an end to such suits altogether, which would seem to obviate the Majority's redressability concern." *WRTL*, 138 F.3d at 1188 (dissenting opinion of Flaum, J.). The panel's conclusion that such relief would not redress injuries due to non-parties, is at odds with *Chamber of Commerce*.

Third, even if a declaratory judgment would not redress WRTL's injuries from possible enforcement by private parties, under the approach of the Eighth Circuit, its claims are still redressable. In *MCCL*, the Eighth Circuit, quoting the plurality opinion in *Larson v. Valente*, 456 U.S. 228, 243, n.15 (1982), held that "a plaintiff satisfies the redressability requirement when he shows that a favorable decision will relieve a discrete injury to himself. He need not show that a favorable decision will relieve his *every* injury." 113 F.3d at 131 (emphasis in original). Thus, in holding that WRTL need obtain relief as to *every* possible injury, the panel's decision conflicts with *MCCL*.

The petition should be granted to resolve these conflicts.

Failure To Follow Precedent

II. The Seventh Circuit's Opinion Also Fails To Follow This Court's Precedent In Holding That A First Amendment, Preenforcement, Facial Overbreadth Challenge Is Not Justiciable Because State Officials Have Not Threatened To Enforce The Statute Against The Plaintiff, And In Holding That Declaring The Statute Unconstitutional And Enjoining Its Enforcement Will Not Redress The Plaintiff's Injuries.

In concluding that WRTL's claims amount to a request for an advisory opinion, *WRTL,* 138 F.3d at 1187 (App. 9), and that the "real problems it confronts," *id.* at 1186 (App. 7), are not redressable, the panel also failed to follow this Court's decisions.

A. By Holding That WRTL's First Amendment, Preenforcement Facial Challenge Is Not Justiciable, The Seventh Circuit's Opinion Conflicts With *Virginia v. American Booksellers.*

In holding that WRTL is not injured because the defendant state officials have not expressly threatened to enforce the statute against it, the panel's decision conflicts with this Court's opinion in *Virginia v. American Booksellers, Inc.,* 484 U.S. 383 (1988). There, this Court held that the plaintiff was injured, and thus could challenge a statute under the First Amendment prior to its enforcement, because: 1) the statute's plain language proscribed activities in which the plaintiff wanted to engage; and 2) the plaintiff had altered his activities to avoid running afoul of the statute. *Id.* at 392 ("the law was aimed directly at plaintiffs, who, if their interpretation is correct, will have to take significant and costly compliance measures or risk criminal prosecution."). This court noted that "the alleged danger . . . is, in large measure, one of self-censorship [chilling effect]; a harm that can be realized

without actual prosecution." *Id.*[10] The Court should grant the petition because the panel failed to follow this Court's precedent.

B. By Holding That WRTL's Claims Are Not Redressable Because A Declaration Of Facial Invalidity Would Not Protect It From Possible Enforcement By Private Parties, The Seventh Circuit's Opinion Conflicts With *Steffel v. Thompson* and *Larson v. Valente.*

Enjoining the Board and the Attorney General from enforcing Wisconsin's overbroad PAC definition would redress WRTL's injury that is due to possible *state* enforcement. WRTL will now show that the panel failed to follow the decisions of this Court in concluding that: 1) declaring the PAC definition and the citizen suit provision facially unconstitutional would not redress WRTL's injury that is due to possible *private party* enforcement and; 2) WRTL's relief must do so in order for it to have standing.

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[10] In *American Booksellers* this Court noted that "[t]he State has not suggested that the newly enacted law will not be enforced." *Id.* But, in doing so, this Court was *not* suggesting that if the state would have simply assured it that the laws would not be enforced according to their plain language, an injury (chill) would not have existed. Rather, it held that absent an *authoritative* construction of the law, the plaintiff would continue to be injured, notwithstanding any promises the state's lawyers might make concerning how their client would interpret the statute. The reason, at least in part, is that oral assurances regarding how a statute is interpreted do not provide the authoritative construction needed to remove chilling effect. This rationale underlies the decision in *American Booksellers* to reject the non-binding interpretation of the law proffered by the State: "as the Attorney General does not bind the state courts or local law enforcement agencies, we are unable to accept her interpretation of the law as authoritative." *Id.* at 395.

1. Declaring Wisconsin's Definition Of PAC Facially Unconstitutional Would Benefit WRTL If Private Parties Later Enforced This Statute Against It.

In *Steffel v. Thompson*, 415 U.S. 452, 470-471 (1974), this Court noted the importance of declaratory relief as a remedy. Its value is that it *deters* future state court prosecutions. *Id.* at 470.

> Even where a declaration of unconstitutionality is not reviewed by this Court, the declaration may still be able to cut down the deterrent effect of an unconstitutional state statute. The persuasive force of the court's opinion and judgment may lead state prosecutors, courts, and legislators to reconsider their respective responsibilities toward the statute. Enforcement policies or judicial construction may be changed, or the legislature may repeal the statute and start anew. Finally, the federal court judgment may have some *res judicata* [or collateral estoppel] effect. . . . *Id.*

Indeed, this Court noted that in *Roe v. Wade*, 410 U.S. 113 (1973), and *Doe v. Bolton*, 410 U.S. 179 (1973), the *sole* relief it had afforded the plaintiffs were declaratory judgments because it anticipated that they would be given effect.

> In those cases, we declined to decide whether the District Courts had properly denied to the federal plaintiffs, against whom no prosecutions were pending, injunctive relief restraining enforcement of the Texas and Georgia criminal abortion statutes; instead, we affirmed the issuance of declaratory judgments of unconstitutionality, *anticipating that these would be given effect by state authorities.*

Steffel, 415 U.S. at 469 (emphasis added).

In this case, Wisconsin's broad definition of PAC chills WRTL from engaging in core political speech. *See* p. 5, *supra*. Contrary to the panel's belief, this injury exists because *facially overbroad language* gives not only the

Board, but also private parties, via the citizen suit provision, *the discretion* to enforce the statute against WRTL, Part I.A., *supra,* and both of these groups have recently exhibited the wherewithal to enforce it. The panel recognized that *private parties* would not be bound by an injunction. *See* p. 8, *supra.* While this is true, collateral estoppel may bind them. *Cf. Steffel, supra.* Further, in this case "a declaration may still be able to cut down the deterrent effect of an unconstitutional state statute." *Steffel,* 415 U.S. at 470. And "[t]he persuasive force of the court's opinion and judgment may lead state prosecutors, courts, and legislators to reconsider their respective responsibilities toward the statute." *Id.* "Enforcement policies or judicial construction may be changed, or the legislature may repeal the statute and start anew." *Id.*

In short, like *Roe* and *Doe, supra,* it is only reasonable to "anticipat[e] that [such a declaration] would be given effect by [private parties and] state authorities." *Id.* at 469. Private parties would not prosecute WRTL based upon statutes that a federal court has declared unconstitutional, and state court judges would not order WRTL to comply with them. By obtaining such a declaration, then, WRTL will have redressed the chill inherent in possible *private* enforcement of an overbroad statute. Because it failed to recognize the benefits of declaratory judgment on non-parties, the panel here erred.[11]

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[11] A declaratory judgment would not redress the plaintiff's injuries in *Steel Co. v. Citizens for a Better Env't,* 118 S. Ct. 1003 (1998), because it would have been retroactive relief *for an injury that was already remedied. Id.* at 1018. In WRTL's case, however, a declaratory judgment would be *prospective relief* to prevent the state and private parties from enforcing unconstitutional state statutes against WRTL. Unlike the plaintiff in *Steel Co.,* then, such a judgment would redress WRTL's current and future injuries, both of which are due to the chilling effect on WRTL's First Amendment rights. *See id.* at 1019 ("The remaining relief respondent seeks . . . is injunctive in nature. It cannot conceivably remedy any past wrong but is aimed at deterring petitioner from violating EPCRA in the future. The latter objective can of course be 'remedial' for Article III purposes, when threatened injury is one of the gravamens of the

2. Even If The Declaration Of Facial Unconstitutionality Would Not Benefit WRTL In Future Actions By Private Parties, Its Injury Is Still Redressable Because A Declaration And Injunction Against The State Defendants Would Remedy A Discrete Injury To WRTL, And WRTL Need Not Remedy Every Possible Injury.

The panel here failed to recognize that under this Court's decisions, WRTL's claims are still justiciable even if declaratory relief would not redress the chilling effect on the exercise of WRTL's First Amendment rights that is due to potential private party enforcement. In *Larson v. Valente*, 456 U.S. 228 (1982) (plurality opinion), this Court specifically rejected the notion that a party must be able to redress all of its injuries in order for its claims to be justiciable. It noted that it "ha[d] recognized that 'the relevant inquiry is whether the plaintiff has shown *an* injury to himself that is likely to be redressed by a favorable decision.' " *Id.* at 243, n.15 (quoting *Simon v. Eastern Ky. Welfare Rights Org.*, 426 U.S. 26, 38 (1976)) (emphasis in *Valente*). The Court held that "a plaintiff satisfies the redressability requirement when he shows that a favorable decision will relieve a discrete injury to himself. He need not show that a favorable decision will relieve his *every* injury." *Id.* (emphasis in original).

Thus, under *Valente*, declaratory and injunctive relief as to state officials will have remedied *an* injury to WRTL. That renders its claims justiciable. The panel's contrary holding "reveals a draconian interpretation of the redressability requirement that is justified by neither precedent nor principle." *Id.*

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complaint.") (cited in *WRTL*, 138 F.3d at 1188-1189, App. 13-14) (dissenting opinion of Flaum, J.).

A Question Of Great Public Importance

III. Does The Panel's Approach Narrow Dangerously The Window For Preenforcement Lawsuits Formed By *Ex Parte Young* And *Younger v. Harris*?

This Court's decision in *Ex Parte Young*, 209 U.S. 123 (1908), "holds that federal courts have the power to enjoin threatened state action that, if carried out, would violate the plaintiff's federal rights." *Alleghany Corp. v. Hasse*, 896 F.2d 1046, 1049 (7th Cir. 1990) (opinion of Posner, J.), *vacated as moot*, 499 U.S. 933 (1991). It thus allows federal courts to protect citizens against possible unconstitutional state action. *Id.* at 1049-1051. At the other end of the spectrum, this Court's decision in *Younger v. Harris*, 401 U.S. 37 (1971), holds that, for reasons of comity, federal courts cannot protect a plaintiff (save in rare circumstances) from unconstitutional state action if state judicial or quasi-judicial proceedings have begun. *Alleghany*, 896 F.2d at 1050-1053. These two doctrines form a window within which persons who are in jeopardy of being victims of unconstitutional state action may seek protection from the federal judiciary. *Id.* at 1049-1051.

In *Alleghany*, Judge Easterbrook concurred in an opinion that refused "to issue a death warrant for *Ex Parte Young*," *id.* at 1050, by expanding the abstention doctrine of *Younger v. Harris* or requiring the exhaustion of state administrative remedies. *Id.* at 1053-1056 (concurring opinion of Easterbrook, J.). But the opinion he has authored in this case will go a long way to doing just that. By requiring for a justiciable controversy that a state expressly threaten a plaintiff with enforcement, or moreover – as he intimates by referring to the decision in *BAPAC* (of which he was a part) – investigate him prepatory to enforcement, he has dangerously lowered the window of federal judicial relief. It is now near the point where state enforcement proceedings and the abstention doctrine of *Younger v. Harris* will shut it. The petition should be granted to keep open this window.

CONCLUSION

In *Steffel*, 415 U.S. 452, this Court established the ability of persons to challenge statutes on their face prior to enforcement. It stated that in the First Amendment context, "it is not necessary that [a plaintiff] first expose himself to actual arrest or prosecution to be entitled to challenge a statute that he claims *deters* the exercise of his constitutional rights." *Id.* at 459 (emphasis added). To decide otherwise would "place the hapless plaintiff between the Scylla of intentionally flouting state law and the Charybdis of forgoing what he believes to be constitutionally protected activity to avoid becoming enmeshed in a criminal proceeding." *Id.* at 462.

Here, Judge Easterbrook acknowledged that WRTL is in a precarious position because of the demonstrated willingness of the state and private parties to enforce an extremely broad statute against similar groups for engaging in similar speech. *WRTL*, 138 F.3d at 1184-1187 (App. 3-9). But he concluded that because state officials have not expressly threatened WRTL with enforcement, *id.* at 1184 (App. 2-4), WRTL cannot protect itself in federal court. Indeed, he notes that after this ruling, the only avenues open to WRTL are state court intervention and amicus participation. *Id.* at 1187 (App. 10).

This indifference to WRTL's plight is obnoxious to the rationale that undergirds *Steffel*. Accordingly, WRTL respectfully prays that the Court grant a writ of certiorari to review the judgment of the Seventh Circuit.

July 15, 1998

Respectfully submitted,

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APPENDIX

APPENDIX

Page

Appendix A –
Opinion of the United States Court of the Seventh Circuit, dated March 13, 1998 (vacating decision of the district court with instructions to dismiss) ..... App. 1

Appendix B –
Opinion of the United States District Court for the Western District of Wisconsin, dated September 17, 1997 (denying motion to dismiss for lack of justiciability, granting motion to abstain with leave to reinstate, if necessary, following adjudication of federal constitutional challenges in state court) ..... App. 15

Appendix C –
Order of the United States Court of Appeals for the Seventh Circuit, dated April 16, 1998 (denying petition for rehearing with suggestion for rehearing en banc) ..... App. 46

Appendix D –
Judgment of the United States Court of Appeals for the Seventh Circuit, dated March 13, 1998 (vacating the judgment of the district court and remanding with instructions) ..... App. 47

Appendix E –
The First and Fourteenth Amendments to the Constitution of the United States, relevant provisions of Chapter 11, "Campaign Financing," of the Wisconsin Statutes, and Regulation 1.28 of the Wisconsin Administrative Code (State Elections Board) ..... App. 48

Appendix F –
Verified Compaint, filed April 14, 1997 (without exhibits) ..... App. 58

APPENDIX A

WISCONSIN RIGHT TO LIFE, INC.,
Plaintiff-Appellant,

v.

Gregory J. PARADISE, Chairman of the Wisconsin State Election Board, et al.,
Defendants-Appellees.

No. 97-3668.

United States Court of Appeals,
Seventh Circuit.

Argued Jan. 14, 1998.

Decided March 13, 1998.

Rehearing and Suggestion for Rehearing En Banc Denied April 16, 1998*.

James Bopp, Jr. (argued), Glenn Willard, Bopp, Coleson & Bostrom, Terre Haute, IN, for Plaintiff-Appellant.

Alan Lee (argued), Office of the Attorney General, Wisconsin Department of Justice, Madison, WI, for Defendants-Appellees.

Before FLAUM, EASTERBROOK, and DIANE P. WOOD, Circuit Judges.

EASTERBROOK, Circuit Judge.

Wisconsin Right to Life, Inc., is a nonprofit anti-abortion organization that enjoys tax-exempt status under 26 U.S.C. § 501(c)(4). Tax exemption (and the associated deductibility of contributions) is incompatible with partisan political activity; to conduct express advocacy in

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* Judge Ripple took no part in the consideration or decision of this matter.

elections WRTL has formed a political action committee that does not enjoy tax benefits. But almost everything related to abortion has political implications, and it is a challenge for any organization on any side of the abortion debate to carry out its principal activities without saying things about candidates for public office. WRTL publishes voter guides and flyers identifying candidates' positions on questions related to abortion and implicitly soliciting votes for the candidates whose positions are closest to WRTL's. (The affiliated PAC has published more explicit advertisements.) WRTL believes that its issue guides, flyers, and advertisements are political speech protected by the first amendment, and that it need not register as a political committee on their account – not only because the speech is independent of anyone's campaign and not "express" advocacy of candidates' elections but also because WRTL's "major purpose" is unrelated to the election of particular candidates. *See FEC v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238, 107 S.Ct. 616, 93 L.Ed.2d 539 (1986); *Buckley v. Valeo*, 424 U.S. 1, 96 S.Ct. 612, 46 L.Ed.2d 659 (1976). No one has threatened WRTL with sanctions or ordered it to register as a political committee, under either the Federal Election Campaign Act or its state counterpart, Wis. Stat. §§ 11.001-11.66. No one has sued WRTL under the citizen-suit provisions of the state law, § 11.60 and § 11.66. Nonetheless, claiming to fear the consequences of registration should it continue its former ways, WRTL curtailed its program of voter education and filed this suit against the Attorney General of Wisconsin and all members of the Wisconsin State Election Board, seeking declaratory and injunctive relief that would compel these state officials to administer the

state election laws in accord with *Buckley* and *Massachusetts Citizens for Life*. The district court concluded that WRTL has standing to sue but abstained under *Texas Railroad Commission v. Pullman Co.*, 312 U.S. 496, 61 S.Ct. 643, 85 L.Ed. 971 (1941), holding that the state law is subject to a narrowing construction that would eliminate the constitutional claim WRTL advances.

Wisconsin's statute is much like the Federal Election Campaign Act. To a lay reader, both statutes require almost any group that wants to say almost anything about a candidate or election to register as a political committee. But in *Buckley* the Supreme Court construed (some would say rewrote) the federal statute to avoid some of the many constitutional problems that arise when regulating political speech, the core of the first amendment's domain. In *Massachusetts Citizens for Life* the Court held that many elements of the *Buckley* approach are required by the first amendment, which means that they apply to the states. *See Austin v. Michigan Chamber of Commerce*, 494 U.S. 652, 110 S.Ct. 1391, 108 L.Ed.2d 652 (1990). The Supreme Court of Wisconsin has yet to decide a case under the parts of the state law that potentially affect WRTL, although the statute was enacted in 1973. WRTL wants us to instruct the defendants that the state court will (a la *Buckley*) or must (a la *Massachusetts Citizens for Life*) treat the state's law as inapplicable to candidate comparisons and other forms of implicit advocacy, indeed as inapplicable even to express electioneering by a group whose major purpose concerns issues rather than candidates. Put this way, however, WRTL's suit seeks an advisory opinion. For unlike the plaintiff in *Brownsburg Area Patrons Affecting Change v. Baldwin*, 137 F.3d 503 (7th

Cir.1998), an otherwise-similar case in Indiana, WRTL is not now threatened by any application of Wisconsin's law. It dreads such a possibility, and "actual and well-founded fear that the law will be enforced against" a group can make a claim justifiable even if enforcement lies in the future. *Virginia v. American Booksellers Ass'n*, 484 U.S. 383, 393, 108 S.Ct. 636, 643, 98 L.Ed.2d 782 (1988); *see also American Booksellers Ass'n v. Hudnut*, 771 F.2d 323 (7th Cir.1985), *aff'd mem.*, 475 U.S. 1001, 106 S.Ct. 1172, 89 L.Ed.2d 291 (1986). We may assume that WRTL has genuine apprehension about what lies ahead. But is its concern objectively "well-founded"? If not, Article III of the Constitution precludes a federal court from ruling. Moreover, WRTL has standing only if the harm in prospect can be redressed by the relief it seeks. *See Steel Co. v. Citizens for a Better Environment*, ___ U.S. ___, ___, 118 S.Ct. 1003, 1016, ___ L.Ed.2d ___ (1998); *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561, 112 S.Ct. 2130, 2136-37, 119 L.Ed.2d 351 (1992); *Allen v. Wright*, 468 U.S. 737, 752, 104 S.Ct. 3315, 3325, 82 L.Ed.2d 556 (1984); *Simon v. Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26, 38, 42-43, 96 S.Ct. 1917, 1924, 48 L.Ed.2d 450 (1976). "Redressability" is an insurmountable hurdle for WRTL, as we shall see.

Although Wisconsin's law has been on the books for almost 25 years, the Election Board has not prosecuted any issue-advocacy group such as WRTL for failing to register as a political committee. This is not an accident. Shortly after the Supreme Court decided *Buckley*, the Attorney General of Wisconsin issued an opinion, 65 Op. Att'y Gen. 145 (1976), informing the Board that the approach articulated in *Buckley* should be applied to the state law as well. Every Attorney General of Wisconsin to

hold office since 1976 has adhered to this view. This opinion is not binding on the Board, but in his role as the Board's lawyer the Attorney General can make his view felt. Although the Board is entitled to control litigation in the court of first instance, Wis. Stat. § 11.60(4), it generally requests the Attorney General to represent it under Wis. Stat. § 165.25(6), and the Attorney General always assumes control in the appellate courts. Wis. Stat. § 166.25(1). What is more, the Board appears to agree with the Attorney General. In August 1976 it promulgated a rule stating that groups are subject to registration and disclosure requirements only if they make political contributions to candidates (which WRTL does not) or "[m]ake expenditures for the purpose of expressly advocating the election or defeat of an identified candidate." Wis. Admin. Code § ElBd 1.28(2)(c). The Board does not have a regulation on the "major purpose" question, but § 1.28(2)(c), coupled with the Attorney General's opinion, appears to provide WRTL with the benefits it seeks from this lawsuit. Both sides to this litigation agree that guides and flyers, issued by groups such as WRTL, showing candidates' positions on issues the group deems significant, do not require the group to register as a political committee. How can a suit present a "case or controversy" when all litigants are on the same side?

WRTL's answer is that the parties disagree about the implementation of the principles articulated in *Buckley* and *Massachusetts Citizens for Life*. To acknowledge that these decisions govern the administration of Wisconsin's law is not necessarily to know how any particular facts should be handled. Recent events before the Board demonstrate this vividly. Several organizations similar to

WRTL in their dedication to support of particular issues (such as term limits or environmental protection) ran advertisements during the 1996 election season. Many of these advertisements identified candidates' positions on the issues of concern to the organization and called on the voters to support candidates whose views the organizations approved. The advertisements did not say "vote for X", but members of the target audience were likely to conclude that voting was one form of support the organizations had in mind. Several candidates on the wrong side of these ads complained to the Board (and also to the state courts, on which more below). A careful opinion by the Board's legal counsel outlined the current state of federal law, informing the Board that, although one court of appeals has concluded that advertisements similar to those placed in Wisconsin require a group to register as a political committee, *see FEC v. Furgatch*, 807 F.2d 857 (9th Cir.1987), others have concluded that such advertisements are outside the federal statute under *Buckley*, protected by the first amendment under *Massachusetts Citizens for Life*, or both. *E.g., FEC v. Christian Action Network, Inc.*, 110 F.3d 1049 (4th Cir.1997); *Maine Right to Life Committee, Inc. v. FEC*, 98 F.3d 1 (1st Cir.1996). The legal counsel also could have informed the Board that the application of the "major purpose" standard to issue advocacy groups has given rise to disagreements, *see Akins v. FEC*, 101 F.3d 731 (D.C.Cir.1996) (en banc), *cert. granted*, ___ U.S. ___, 117 S.Ct. 2451, 138 L.Ed.2d 210 (1997) (argued Jan. 14, 1998), but the parties to the administrative proceeding apparently did not lock horns on that subject. The Board's legal counsel concluded that the Supreme Court is more likely to follow the approach of

Christian Action Network and *Maine Right to Life Committee* than the approach of *Furgatch*. In the event, however, the Board seems to have been persuaded by *Furgatch*, for it issued an order requiring the advertisers to register as political committees under Wisconsin law. We say "seems" because the Board's order does not give any reasons, and this is not the only weasel word in the preceding sentence. The Board lacks the authority to "require" registration; the statute rather than the Board does the requiring. Its decision tells the advertisers that if they do not register and provide the information required of political committees then "their records will be subpoenaed." *Travis v. Americans for Limited Terms, Inc.*, Elections Board Opinion & Order 96-38 (Mar. 17, 1997), at 1. They would be free to oppose the subpoenas and any penalties the Board proposes, which would propel the dispute toward state court – where the Attorney General's views would take center stage. But these details need not detain us. WRTL offers the Board's decision as proof that it faces a genuine risk that speech on political subjects will lead to registration as a political committee. We think that this shows why the relief WRTL seeks is unrelated to the real problems it confronts.

Recall that WRTL has not engaged in any speech that the Board has found to be inappropriate for a group unregistered as a political committee. WRTL's argument accordingly must be that the Wisconsin campaign laws are unconstitutional as written rather than as applied – in legal jargon, that the statute is unconstitutional "on its face" unless understood to mean what *Buckley* says the Federal Election Campaign Act means. WRTL makes this explicit by arguing that the state law cannot be construed

in a constitutional way and therefore must be invalidated *en toto*. Stated this way the argument is hopeless; the Supreme Court of Wisconsin has no less ability to construe the state law in a constitutional fashion than the Supreme Court of the United States displayed in *Buckley*. A litigant cannot create a case or controversy just by making an untenable "facial" attack on a statute; actual injury and redressability are essential no matter how the challenge is cast.

Suppose we were to agree with WRTL to the extent of saying that the Board must proceed as if *Buckley* and *Massachusetts Citizens for Life* were written directly into the Wisconsin statute. How could this eliminate the risk WRTL faces? The question seemingly before the Board in *Travis* was not whether to apply *Buckley* – for every responsible official in Wisconsin believes that this is necessary – but what its approach means in practice. Appellate decisions such as *Furgatch* and *Christian Action Network* give different answers not because they disagree about whether *Buckley* and *Massachusetts Citizens for Life* "apply" but because these decisions do not give unambiguous answers to the myriad situations that arise. A judgment along the lines of "Dear Board, you must follow *Buckley*" or "apply the state law only to explicit advocacy" would not dictate one outcome rather than another in the sort of cases about which WRTL is concerned. To relapse into jargon, the injury WRTL fears is not redressable by an order of the kind it seeks. Perhaps a more elaborate injunction, one that tried to lay down the right answer in *Travis* and other cases besides, could provide relief, but such an order would exceed the constitutional powers of the federal judiciary under Article III. A court

is not permitted to prescribe how a state must deal with disputes that have never arisen and may never do so, or with disputes that third parties have with the Board. Such a foray is the paradigm of an advisory opinion. It would also be obnoxious to threaten state officials with penalties for contempt of court if at some future time they were to interpret *Buckley* and *Massachusetts Citizens for Life* differently from the way the district court interprets it. Review of the Board's future decisions through the contempt mechanism, rather than by an action in state court, would pose serious problems under *Younger v. Harris*, 401 U.S. 37, 91 S.Ct. 746, 27 L.Ed.2d 669 (1971). When the only way to make relief effective is to write an order so broad that it becomes advisory, and so meddlesome that it effectively appoints a federal judge as the administrator of the state statute, a court can be sure that the case is not justiciable. The nature of the problem is incompatible with a one-injunction-resolves-all solution.

None of this is to deny that WRTL's concerns are genuine. The Board's decision in *Travis* was not exactly reassuring, though the Attorney General may prevent anything from coming of it. But, as the district court perceived, the real threat is not from the Board but from the private actions authorized by Wis. Stat. §§ 11.60, 11.66. The candidates whose complaints led to the decision in *Travis* also filed suits against the organizations responsible for the ads. State judges issued temporary restraining orders against further publication of the advertisements, and Wisconsin's court of appeals refused to disturb these orders despite the fact that they were prior restraints of speech. Three cases against the WMC Issues Mobilization Council, Inc., have been consolidated

for decision before one judge, and Travis's suit against Americans for Limited Terms is pending before a different judge. Decisions in these cases could bode ill for WRTL – although the fact that another state court, after agreeing with *Furgatch*, nonetheless dismissed a suit by the Board suggests that the risk is slight. *See Elections Board v. Wisconsin Manufacturers and Commission*, No. 97 CV 1729 (Dane County Cir. Ct. Jan. 16, 1998). At all events, federal litigation under § 1983 is no substitute for the usual ways to protect a legal interest threatened by a third party's suit: intervention or appearance as amicus curiae.

Nothing within a district court's power would require the state judges to decide these cases one way rather than another. Under the supremacy clause, the state courts must follow the Constitution of the United States, but not necessarily our interpretation of the Constitution. Only the parties need respect a decision by an inferior federal court. Yet the candidates who filed the state cases are not parties to this one. Neither are the state judges – nor could they be made parties. The only defendants are the Attorney General and members of the Board. Against them alone would relief run. If sued in state court by candidates offended by its flyers, brochures, or ads, WRTL could not plead a federal judgment as a defense; the candidates, not parties to the federal case, would not be bound by the outcome. *See Baker v. General Motors Corp.*, ___ U.S. ___, 118 S.Ct. 657, 139 L.Ed.2d 580 (1998); Fed.R.Civ.P. 65(d) (an injunction "is binding only upon the parties to the action, their officers, agents, servants, employees, and attorneys, and upon those persons in active concert or participation with them

who receive actual notice of the order"). Potential injury from decisions by state courts in private litigation is not redressable by any order that could be issued in this case.

This conclusion puts WRTL to a hard choice. It may steer clear of controversy pending the outcome of the litigation now wending its way through state court; it may make its views known to the state judges; or it may take its chances and rely on the precedential force of the Supreme Court's decisions (and the support of Wisconsin's Attorney General) if it finds itself a defendant in court or a respondent before the Board. What it may not obtain, given the limitations of Article III, is an order that attempts to resolve a controversy that has not yet arisen and may never arise. The judgment of the district court is vacated, and the case is remanded with instructions to dismiss the complaint for want of jurisdiction.

FLAUM, Circuit Judge, dissenting.

I am unable to join the Majority's conclusion that WRTL's suit is not justiciable. In my view, the Majority's position rests on an incorrect characterization of the nature of WRTL's suit.

The Majority holds that WRTL's suit is nonjusticiable for two reasons: WRTL's requested relief calls for an advisory opinion, *supra* at 7; and WRTL has no standing because its alleged injury is not redressable by the relief it seeks, *id.* at 8-9. (The Opinion also suggests, but does not hold, that WRTL lacks standing because its fear of prosecution is not well-founded. *Id.* at 3.) The Majority reaches these conclusions because it understands WRTL to be asking the federal courts to "instruct the defendants that the state court will (a la *Buckley*) or must (a la

Massachusetts Citizens for Life) treat the state's law as inapplicable to candidate comparisons and other forms of implicit advocacy". *Id.* at 3. In other words, the Majority states, WRTL is asking this Court "to say[ ] that the Board must proceed as if *Buckley* and *Massachusetts Citizens for Life* were written directly into the Wisconsin statute." *Id.* at 6. *See also id.* at 2 ("WRTL . . . filed this suit . . . seeking declaratory and injunctive relief that would compel these state officials to administer the state election laws in accord with *Buckley* and *Massachusetts Citizens for Life.*"). The Opinion then proceeds, I believe correctly, to explain why such relief would be both inappropriate and ineffective in addressing WRTL's core concerns about speech-chilling prosecutions.

I respectfully suggest that this analysis, although internally consistent, rests on a faulty premise. WRTL asked the district court to declare the Wisconsin statute (or portions thereof) unconstitutional on its face* and, furthermore, to enjoin enforcement of the law. Striking down the statute as unconstitutional on its face would not require this Court to issue an advisory opinion about how Wisconsin courts should interpret *Buckley* and *Massachusetts Citizens for Life* in various cases against third parties, as the Majority fears. If the statute were declared unconstitutional, there would be no valid enactment for

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* Specifically, WRTL contends that the Wisconsin statutes impose unconstitutional registration requirements, both by defining "political committees" too broadly and by failing to exempt from registration certain kinds of not-for-profit organizations. WRTL also claims that the Board enforcement and citizen suit provisions permit unconstitutional prior restraints on protected speech.

the state courts to interpret. Moreover, striking down the citizen suit provisions as unconstitutional would effectively put an end to such suits altogether, which would seem to obviate the Majority's redressability concern.

The Majority, however, interprets WRTL's suit to be asking for the federal courts to impose a narrowing construction on the Wisconsin statute (or to enjoin the state courts from failing to employ such a construction) that would force the state courts to adhere to *Buckley* and other precedent. This understanding of WRTL's suit is contradicted by WRTL's argument, made in response to the district court's decision to abstain, that no such narrowing construction is appropriate or available. *See* Appellant's Br. at 20-25 (arguing that the district court erred in abstaining because the statutes at issue are not susceptible to a limiting construction).

Although the Majority acknowledges at one point that this is a facial attack on the Wisconsin statute – though an "untenable" one, in its view – it glosses over this point with the statement that "actual injury and redressability are essential no matter how the challenge is cast". *Supra* at 6. Of course, I agree with this statement in principle, but since the Majority never holds that WRTL lacks a credible threat of prosecution, and the redressability concern would vanish if we were to declare the citizen suit provisions unconstitutional, I believe that WRTL's suit meets both the injury and the redressability criteria. *See Steel Co. v. Citizens for a Better Env't*, ___ U.S. ___, 118 S.Ct. 1003, 1018, ___ L.Ed.2d ___ (1998) (noting that a plaintiff seeking injunctive relief to prevent "threatened injury" or "the imminence of a future violation" satisfies the injury and redressability criteria when

"the injunctive relief requested would remedy that alleged harm"). The Majority suggests that WRTL's facial challenge would fail because "the Supreme Court of Wisconsin has no less ability to construe the state law in a constitutional fashion than the Supreme Court of the United States displayed in *Buckley*." *Supra* at 6. This may turn out to be correct, but in my view the merits of this facial challenge (and the related issue of abstention) require the attention of the court.

Thus, it is my judgment that the Majority opinion, though well-reasoned, addresses the wrong questions. Although it is not certain that the merits would ultimately be reached, given the reasons for abstention presented by the district court, I cannot conclude that WRTL's suit is nonjusticiable. Accordingly, I respectfully dissent.

APPENDIX B

EXHIBIT B

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

WISCONSIN RIGHT TO LIFE, INC.,

Plaintiff,

v.

GREGORY J. PARADISE, in his official capacity as Chairman of the Wisconsin State Elections Board; JOHN NIEBLER, in his official capacity as Vice-Chairman of the Wisconsin State Elections Board; BARBARA KRANIG, in her official capacity as Secretary of the Wisconsin State Elections Board; MICHAEL BRENNAN, in his official capacity as a member of the Wisconsin State Elections Board; WALTER DICKEY, in his official capacity as a member of the Wisconsin State Elections Board; DAVID HALBROOKS, in his official capacity as a member of the Wisconsin State Elections Board; J. CURTIS McKAY, in his official capacity as a member of the Wisconsin State Elections Board; JUDD DAVID STEVENSON, in his official capacity as a member of the Wisconsin State Elections Board; and JAMES E. DOYLE, in his official capacity as Attorney General for the State of Wisconsin,

Defendants.

OPINION
AND
ORDER

97-C-323-C

(Filed
Sept. 17, 1997)

This is a civil action for declaratory and injunctive relief in which plaintiff seeks to enjoin defendants from enforcing various provisions of Wisconsin's campaign financing laws, Wis. Stat. Ch. 11. In addition, plaintiff asks this court to declare that these same provisions violate the First Amendment of the United States Constitution. The case is before the court on defendants' motion to dismiss on the grounds that (1) plaintiff has failed to state a claim upon which relief may be granted or (2) the matter is not justiciable. In the alternative, defendants ask this court to abstain under the *Pullman* doctrine.

I conclude that because plaintiff has alleged sufficient facts to establish that it would like to engage in express advocacy, plaintiff has standing to bring those counts of its complaint regarding the "major purpose" test. Because plaintiff has suffered a tangible injury and because there is a credible threat of prosecution, plaintiff also possesses standing to bring the remaining counts of its complaint. All ten counts are ripe for review because they are fit for judicial resolution and because withholding consideration may subject plaintiff to hardship. Therefore, the motion to dismiss for lack of justiciability will be denied. I conclude, however, that abstention is required because all counts of plaintiff's complaint involve an ambiguous area of state law susceptible to a narrowing construction which, if adopted by a Wisconsin court, could avoid or alter significantly the constitutional issues raised by plaintiff. Accordingly, defendants' motion to abstain will be granted.

For the sole purpose of deciding defendants' motion, I find that the well-pleaded allegations of plaintiff's complaint fairly allege the following.

FACTS

Plaintiff is a nonprofit, nonstock, public interest Wisconsin corporation. Defendants Paradise and Niebler are Vice-Chairmen of the Board; defendant Kranig is Secretary; defendants Brennan, Dickey, Halbrooks, McKay, and Stevenson are members. The Board is authorized to bring an action for civil penalties for violations of state campaign financing law. Defendant James E. Doyle is Attorney General for the State of Wisconsin. He is authorized to bring actions for civil and criminal penalties for violations of Wisconsin campaign financing law.

Plaintiff has its principal office in Milwaukee and members and local chapters throughout the state. Plaintiff was formed for the purpose of educating the general public on issues relating to the protection of individual human life, regardless of stage of development or state of dependency. Plaintiff distributes voter guides, flyers, scorecards, and press releases to its members and the general public. These materials influence candidate elections by setting forth the candidates' position on issues of public importance. Representative of the type of literature plaintiff circulates is a flyer asking readers where they stand on abortion and then suggesting that they "compare and decide" on the basis of the positions of opposing candidates for political office. The flyer closes by reminding the reader of the date of an upcoming election. An example of one of plaintiff's press releases

refers to a number of Wisconsin candidates for political office "who share the dream of abortion for any reason, throughout pregnancy, with our taxes." The press release goes on to identify these candidates and their opponents by name, characterizing incumbent state Senator Gary Drzewiecki as "a champion for unborn children."

Plaintiff also publishes a newspaper that sets forth the positions of candidates on issues of public importance. Although plaintiff was not formed for the purpose of supporting the election or nomination of candidates for public office, some issues of its newspaper contain announcements of candidate endorsements. One such issue covered an upcoming contest for the Wisconsin Supreme Court. The article closed by quoting the chair of plaintiff's political action committee that, "the retention of [Justice] Wilcox is 'absolutely essential . . . We hope pro-life people throughout the state will understand the importance of this race and vote on April 1.' "

Plaintiff is exempt from federal income tax under § 501(c)(4) of the Internal Revenue Code. None if its members or shareholders receives any financial benefit from membership other than the receipt of newspapers and informational brochures that are available to anyone upon request.

Donations and contributions solicited through direct mail and telephone marketing appeals constitute plaintiff's primary source of income. Plaintiff does not accept donations for its general fund from business corporations or labor unions. Business activities such as income from the distribution of pro-life literature and the sale of its

mailing lists to political candidates accounted for 5.28% of plaintiff's total annual revenue in 1996, 1.60% in 1995, 5.65% in 1994 and 1.98% in 1993. All contributions are solicited in plaintiff's name.

Before the 1996 general election, organizations similar to plaintiff ran advertisements concerning candidates for political office. Shortly thereafter, the persons targeted in these advertisements, to whom I will refer as the "candidates," filed several lawsuits in state court against the organizations responsible for running them. The candidate received temporary restraining orders enjoining the defendant-organizations from continuing to run or distribute the disputed advertisements. After the state court of appeals refused to overturn these injunctions, three of the cases, *Dixon and Chvala v. WMC Issues Mobilization Council, Inc.* (96-CV-2498), *Gloudeman and Adelman v. WMC Issues Mobilization Council, Inc.* (96-CV-8317) and *Plombon v. WMC Issues Mobilization Council, Inc.* (96-CV-0561) were consolidated before the Honorable Mark Frankel while the fourth case, *Travis v. Americans for Limited Terms, Inc.* (96-CV-2581) is pending before the Honorable Daniel Moser, all in the Circuit Court for Dane County, Wisconsin.

The candidates asked the Wisconsin State Election Board to issue a formal advisory opinion regarding the legality of the disputed advertisements. Although the Board declined, its legal counsel advised the candidates informally that the disputed advertisements did not violate Wisconsin campaign financing law. Nevertheless, the candidates proceeded to file formal complaints with the Board. On March 14, 1997, against the advice of its legal counsel, the Board ruled the disputed advertisements

could be run only by an organization registered as a political action committee, or "committee," under Wisconsin campaign financing law. The Board's legal counsel had argued in a memorandum filed the previous day that the organizations should not be subject to regulation and reporting requirements imposed on committees because the disputed advertisements were a form of constitutionally protected speech. The Board's decision required these organizations to register as committees by April 15, 1997.

Plaintiff believes that the materials it prepares and distributes are identical to the materials prepared and distributed by the organizations now required to register as committees. Consequently, plaintiff believes Wisconsin campaign financing law requires that it too must register as a political action committee. Plaintiff does not wish to do so because registering as a political action committee is burdensome, may result in loss of its tax exempt status and will force plaintiff to pay tax on some of plaintiff's printed material.

Plaintiff spends more than $1,000 per calender year influencing elections through the publication and distribution of its newsletter and pro-life literature. Although plaintiff would like to continue these activities in the future without registering as a political action committee, it fears being sued or becoming the subject of a formal complaint with the Board. Plaintiff also fears that it is presently subject to civil and criminal penalties because of its past activities. Consequently, plaintiff has decided to suspend publication and distribution of its newsletter and pro-life literature.

Plaintiff is and has been supporting the recall from office of United States Senators Russ Feingold and Herb Kohl because they cast votes against a ban on a controversial abortion procedure. Plaintiff would like to spend more than $1,000 in support of the recall effort. In an informal advisory opinion addressed to plaintiff on December 6, 1995, the Board's legal counsel stated that organizations not registered as political action committees could spend money on communications concerning the recall of a current officeholder only *prior* to the date on which a recall drive is officially initiated. A recall drive is officially initiated when someone files a statement of intent to circulate a recall petition.

A statement of intent to circulate a petition to recall Senators Feingold and Kohl was filed on April 4, 1997. Because plaintiff does not wish to register as a committee or run afoul of Wisconsin campaign financing law, it will not spend any money on communications regarding the recall effort, even though it would like to do so.

OPINION

A. Standard of Review

A district court must construe a complaint liberally in favor of the plaintiff, taking as true all well-pleaded factual allegations and all reasonable inferences which may be drawn from them. *Leahy v. Board of Trustees of Community College District No. 508*, 912 F.2d 917, 921 (7th Cir. 1990). The motion to dismiss should be denied unless "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Id.* (quoting *Conley v. Gibson*, 355 U.S. 41,

45-46 (1957)). This standard is grounded in the Federal Rules of Civil Procedure, which provide for a system of notice pleading pursuant to Rule 8, requiring only that the plaintiff set out a "short and plaint statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). "The primary purpose of [Rule 8] is rooted in fair notice: under Rule 8, a complaint 'must be presented with intelligibility sufficient for a court or opposing party to understand whether a valid claim is alleged and if so what it is.' " *Vicom, Inc. v. Harbridge Merchant Servs., Inc.*, 20 F.3d 771, 775 (7th Cir. 1994) (citations omitted). In light of this liberal standard, a plaintiff can resist a 12(b)(6) motion by setting out facts sufficient to outline the basis of its claim. *Panaras v. Liquid Carbonic Industries Corp.*, 74 F.3d 786, 792 (7th Cir. 1996); *see also Conley v. Gibson*, 355 U.S. 41, 45-46 (1957) (motion to dismiss should be granted only if "it appears beyond doubt that [the plaintiff] can prove no set of facts in support of his claim which would entitle him to relief"); *Hrubec v. National R.R. Passenger Corp.*, 981 F.2d 962, 963 (7th Cir. 1992) ("A complaint need not narrate all relevant facts or recite the law; all it has to do is set out a claim for relief.") (citations omitted); *Redfield v. Continental Casualty Corp.*, 818 F.2d 596, 605 (7th Cir. 1987) (a plaintiff need not set out in detail the facts upon which his claim is based).

B. Wisconsin and Federal Campaign Financing Law

Before addressing the merits of defendants' motion, I will provide a brief outline of the law forming the basis of the issues raised in this case. In *Buckley v. Valeo*, 424 U.S. 1 (1976) (per curiam), the United States Supreme Court held that state and federal campaign financing laws must

employ two discrete analyses, the "express advocacy" and "major purpose" tests, to define the type of speech and type of group subject to regulatory oversight. The court drew a categorical distinction between express and issue advocacy. Spending and contribution limits and reporting requirements cannot be imposed on groups that engage exclusively in issue advocacy. The court stopped short of grounding this holding in the Constitution, explaining instead that it was crafted to avoid constitutional problems. *Brownsburg Area Patrons Affecting Change v. Baldwin*, 943 F.Supp. 975, 982 n.3 (S.D. Ind. 1996).

Addressing the process of separating express and issue advocacy, the *Buckley* court recognized that:

> the distinction between the discussion of issues and candidates and advocacy of election or defeat of candidates may often dissolve in practical application. Candidates, especially incumbents, are intimately tied to public issues involving legislature proposals and government actions. Not only do candidates campaign on the basis of their positions on various public issues, but campaigns themselves generate issues of public interest. *Buckley*, 424 U.S. at 42.

Nevertheless, the court proceeded to define express advocacy as expenditures for communications "that expressly advocate the election or defeat of a clearly identified candidate." *Id.* at 80. Issue advocacy, then, is the communication of opinions regarding public issues related to candidates or campaigns without expressly advocating the election or defeat of a particular candidate.

A related case, *Federal Election Comm'n v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238 (1986), established that certain not for profit corporations may engage in express advocacy within limits. In *Massachusetts Citizens*, the Supreme Court held that "independent expenditures" made on behalf of a candidate by the plaintiff-corporation were a protected form of speech not subject to regulatory oversight, *Id.* at 263, and that a provision of the Federal Election Campaign Finance Act of 1971, 2 U.S.C. §§ 431-455, imposing registration and reporting requirements on all corporations making independent expenditures violated the First Amendment. The Supreme Court identified three characteristics of the plaintiff-corporation as significant in its holding. The corporation was (1) formed for the purpose of promoting political ideas, as opposed to political candidates or officeholders; (2) had no shareholders or others with a claim on its assets or earnings; and (3) was neither established by nor accepted contributions from a business corporation or a labor union. *Massachusetts Citizens*, 479 U.S at 264.

Under *Buckley*, 424 U.S. at 79, spending and contribution limits and reporting requirements may be imposed on an organization only if the organization is either under the control of a political candidate or its "major purpose" is the nomination, election, or defeat of candidates for office. The "major purpose" of an organization may be shown by public statements of its purpose or by other means, "such as its expenditures in cash or in kind to or for other benefit of a particular candidate or candidates." *Federal Election Comm'n v. GOPAC, Inc.*, 917 F. Supp. 851 (D.D.C. 1996).

Wisconsin passed its campaign financing laws in 1973, two years after the enactment of the Federal Election Campaign Finance Act. The Wisconsin laws closely resemble their federal analog. Under Wis. Stat. § 11.05(1), only "committees" and "political groups" are subject to political action committee reporting requirements. Under Wisconsin law, "committee" is defined as "any person other than an individual and any combination of 2 or more persons, permanent or temporary, which makes or accepts contributions, or makes disbursements, whether or not engaged in activities which are exclusively political. . . . " Wis. Stat. § 11.01(4). In turn, a "disbursement," is "[a] purchase, payment, distribution, loan, advance, deposit, or gift of money or anything of value . . . made for political purposes." Wis. Stat. § 11.01(7a)(1). The statute provides that "[a]n act is for 'political purposes' when it is done for the purpose of influencing the election or nomination for election of any individual to state or local office, for the purpose of influencing the recall from or retention in office of an individual holding a state or local office. . . . " Wis. Stat. § 11.07(16). Following this general definition are two illustrative examples, of which only the first is relevant for the purpose of this discussion:

Acts which are for 'political purposes' include but are not limited to:

1. The making of a communication which expressly advocates the election, defeat, recall or retention of a clearly identified candidate or a particular vote at a referendum. *Id.*

All organizations fitting this patchwork definition of "committee" that make disbursements in excess of $25 in

a calendar year must file a disclosure statement with the board. Wis. Stat. § 11.05(a). Failure to do so renders an organization ineligible to make any such disbursements. Wis. Stat. § 11.12(1). Two exceptions exist. First, a committee is exempt from reporting requirements if it "does not anticipate . . . making disbursements . . . in excess of $1,000 and does not anticipate accepting any contribution or contributions from a single source . . . exceeding $100 in that year. . . . " Wis. Stat. § 11.05(2r). The second exception applies only to registered committees not organized primarily for political purposes. Such committees need disclose only disbursements that constitute express advocacy. Wis. Stat. § 11.06(2).

C. Plaintiff's Complaint

In counts I and II of the ten-count complaint, plaintiff alleges that the definition of committee in Wis. Stat. § 11.01(4) is either unconstitutionally overbroad or unconstitutionally vague for failing to incorporate the major purpose and express advocacy tests articulated in *Buckley*. In count III, plaintiff alleges that if Wis. Stat. § 11.01(4) does withstand constitutional scrutiny, defendants have interpreted and applied it in violation of *Buckley*. In count IV, plaintiff alleges that Wis. State. §§ 11.60 and 11.66, the citizen suit provisions of chapter 11, are an unconstitutional prior restraint on plaintiff's ability to engage in protected speech because they subject groups that engage only in issue advocacy to civil and criminal liability. In count V, plaintiff contends that the provision in Wis. Stat. § 11.38 prohibiting certain not-for-profit corporations not registered as "committees" from making independent expenditures is either a violation of

Massachusetts Citizens or is unconstitutionally overbroad. In count VI, plaintiff alleges that Wis. Stat. § 11.01(4) is either unconstitutionally overbroad or unconstitutionally vague because it defines issue advocacy groups that influence the recall of elected officials from office as committees. In count VII, plaintiff alleges that Wis. Stat. § 11.01(4) is either unconstitutionally overbroad or unconstitutionally vague because it defines groups whose major purpose is not the election or nomination of candidates as committees if such groups influence the recall of elected officials from office. In count VIII, plaintiff contends that if Wis. Stat. § 11.01(4) is not as plaintiff alleges in the preceding count, agents of the state have interpreted and applied it as such. In count IX, plaintiff challenges as unconstitutional prior restraints the provisions in Wis. Stat. §§ 11.60 and 11.66 allowing both defendants and Wisconsin electors to obtain an injunction barring issue advocacy groups from influencing the recall of elected officials. Finally, in count X, plaintiff alleges that the reporting requirements in Wis. Stat. § 11.06(2) are unconstitutional as applied to expenditures made by plaintiff on express advocacy in its newspapers.

D. Justiciability

To establish a justiciable "case or controversy" under Article III, a plaintiff must allege "such a personal stake in the outcome of the controversy as to assure . . . concrete adverseness. . . . " *Baker v. Carr*, 368 U.S. 186, 204 (1962). Evaluation whether a claim is justiciable raises questions of standing and ripeness. Standing asks whether the asserted injury is grievous enough to warrant judicial intervention; ripeness assumes it is sufficient

to sustain a claim. 13A Charles Alan Wright et al., *Federal Practice and Procedure* § 3531.12 at 50 (1990). Ripeness focuses on whether an injury that has not yet happened is sufficiently likely to happen. *Id.* Put another way, standing focuses on the party, answering *who* may litigate, while ripeness is a question of timing, resolving *when* a party may litigate. *Smith v. Wisconsin Dept. of Agric., Trade and Consumer Protection*, 23 F.3d 1134, 1141 (7th Cir. 1994). On several occasions, the Court of Appeals for the Seventh Circuit has observed that the doctrines of standing and ripeness are closely related and, in some cases, virtually indistinguishable from one another. *See, e.g., Sierra Club v. Marita*, 46 F.3d 606, 610 (7th Cir. 1995); *Smith*, 23 F.3d 1134 at 1141; *Commonwealth Eddison v. Train*, 649 F.2d 481, 483 (7th Cir. 1980). Nevertheless, standing and ripeness are analytically distinct. Because the court of appeals has not abandoned the attempt to draw meaningful distinctions between the two doctrines, *Sierra Club v. Marita*, 46 F.3d at 611, and because the injuries asserted by plaintiff raise questions of remoteness and sufficiency, the justiciability of plaintiff's complaint will be evaluated in light of both standing and ripeness.

Standing is established by showing "a reasonable probability – not a certainty – of suffering tangible harm . . . . " *Hoover v. Wagner*, 47 F.3d 845, 847 (7th Cir. 1995). When the alleged danger of a statute is self-censorship, plaintiffs can suffer harm absent "actual prosecution . . . ," so long as they demonstrate an "actual and well-founded fear that the law will be enforced against them." *Virginia v. American Booksellers Ass'n*, 484 U.S. 383, 393 (1988). Abandoning one's free speech right to avoid arrest, prosecution and conviction constitutes a tangible

harm. *Hoover*, 47 F.3d at 847. A party bringing a pre-enforcement First Amendment challenge to a statute must establish (1) a "specific, serious and plausible . . . " intention to engage in conduct unconstitutionally prohibited, *Hallandale Prof'l Fire Fighters Local 2238 v. City of Hallandale*, 922 F.2d 756, 762 (11th Cir. 1991), and (2) a "credible threat of prosecution." *Chamber of Commerce v. Federal Election Comm'n*, 69 F.3d 600 (D.C. Cir. 1995).

Although the burden of proving these elements falls on plaintiff, a complaint challenged for lack of standing is assessed under the same level of scrutiny applied to any motion to dismiss on the pleadings. "We have held that '[a]t the pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice, for on a motion to dismiss we presume that general allegations embrace those specific facts that are necessary to support the claim.' " *National Org. for Women v. Scheidler*, 510 U.S. 249, 256 (1994) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992)).

In their brief, defendants challenge plaintiff's standing to litigate the "major purpose" issue raised in counts II, III, V, VII, VIII and X, but make no specific arguments why other areas of plaintiff's complaint should be dismissed for lack of standing. Because standing and ripeness implicate this court's jurisdiction, questions of justiciability must be examined whether they are raised by the parties or not. *See Regents of University of Calif. v. Bakke*, 438 U.S. 265, 281 n.14 (1978) ("Petitioner does not object to Bakke's standing, but inasmuch as this charge concerns our jurisdiction under Art. III, it must be considered and rejected."); *Blanchette v. Connecticut Gen. Ins. Corps.*, 419 U.S. 102, 138 (1974) ("[T]o the extent that

questions of ripeness involve the exercise of judicial restraint from unnecessary decision of constitutional issues, the Court must determine whether to exercise that restraint and cannot be bound by the wishes of the parties."); *see also Hometown Co-op Apts. v. City of Hometown*, 515 F.Supp. 502, 504 n.6 (N.D. Ill. 1981). Consequently, I must disregard plaintiff's suggestion that this court is limited to evaluating the standing and ripeness of only those claims addressed by defendants "with particularity."

In counts I, III, IV, VI, and IX, plaintiff alleges that the fear of criminal and civil liability for violation of Wisconsin campaign financing law has chilled plaintiff's desire to engage in issue advocacy. Self-censorship such as this is a tangible harm. Plaintiff has standing to litigate these claims if (1) its complaint contains general allegations sufficient to embrace the specific facts necessary to ascertain it has engaged in issue advocacy in the past and would like to continue doing so in the future and (2) there is a credible threat of prosecution. The distribution of press releases, voter guides and candidate scorecards are issue advocacy because they influence elections by setting forth the position of candidates on issues of public importance. Plaintiff also alleges sufficient facts to establish that a credible threat of prosecution exists. Although the Board has not announced its intention to initiate enforcement proceedings against plaintiff, nothing prevents it from doing so. *See Brownsburg Area Patrons*, 943 F.Supp. at 983. In determining whether a credible threat of enforcement exists, it is significant that the Board has penalized organizations engaging in advocacy similar to that of plaintiff and that these organizations are also the

subject of civil lawsuits for alleged violations of Wisconsin campaign financing laws. In and of themselves, the citizens suit provisions in Wisconsin's campaign financing law, Wis. Stat. §§ 11.60 and 11.66, can constitute a credible threat of enforcement. *See Chamber of Commerce*, 69 F.3d at 603. I conclude that plaintiff has standing to bring counts I, III, IV, VI, and IX of its complaint.

Whether counts II, V, VII, VIII and X of plaintiff's complaint are justiciable is the source of considerably more dispute between the parties. Defendants present five arguments to support their contention that plaintiff does not have standing to litigate the "major purpose" issue: (1) plaintiff does not engage in express advocacy; (2) the record is insufficiently developed for the court to decide the issue; (3) plaintiff has suffered no tangible harm; (4) plaintiff's interpretation of the test may be incorrect; and (5) under the Internal Revenue Service code, plaintiff is prohibited from engaging in the political speech at issue.

Only the first of defendants' five arguments will be addressed in detail. I have already found that the chilling effect on plaintiff's free speech rights does constitute a tangible harm. In the context of justiciability, whether the record is sufficient is a question of ripeness. Plaintiff misconstrues the significance of defendants' remaining contentions, that plaintiff's interpretation of the major purpose test is incorrect and that as a tax-exempt organization plaintiff's speech should be chilled by Wisconsin campaign financing law. These are not arguments against standing. Rather, they are arguments in support of defendants' motion to dismiss for failure to state a claim. Indeed, defendants introduce the first matter in their

brief by stating, "[e]ven if [plaintiff] had standing . . . ," and then go on to make their argument. Brief at 12. If defendants' motion to abstain were not being granted, the sufficiency of plaintiff's formulation of the "major purpose" test as well as the limits placed on its activities by the Internal Revenue Code could be properly addressed in the context of defendants' Rule 12(b)(6) motion.

The "major purpose" test permits groups not registered as political action committees to engage in a limited amount of express advocacy so long as their major purpose is not the nomination, election, or defeat of candidates for office. In *Brownsburg Area Patrons*, 943 F.Supp. at 993, the absence of a major purpose test in Indiana's campaign financing statutes had no effect on the plaintiff's activities because the plaintiff failed to establish an intention to engage in express advocacy. Consequently, the plaintiff had no standing to challenge the statutes on these grounds. *Brownsburg Area Patrons* came before the district court on a motion for preliminary injunction, accompanied by a factual record consisting not only of the complaint but responses to requests for admissions and interrogatories, a deposition and witness testimony. To obtain a preliminary injunction, a moving party must meet an exacting standard. *See Abbott Labs. v. Mead Johnson & Co.*, 971 F.2d 6, 11 (7th Cir. 1992). Plaintiff's burden at the pleadings stage is considerably less rigorous. I have already concluded that a credible threat of enforcement exists. Thus, to survive a standing challenge, plaintiff's complaint must contain general allegations sufficient to embrace the specific facts necessary to ascertain it has engaged in express advocacy in the past and would like to continue doing so in the future.

Plaintiff has alleged specific and plausible facts to the effect that it would like to continue to publish announcements of candidate endorsements in its newsletter. Plaintiff characterizes the announcements of candidate endorsements printed in its newsletter as a "minor amount of what might be viewed as express advocacy," complaint ¶ 33, "what might be considered express advocacy," complaint ¶ 104, and "putative express advocacy." Complaint ¶ 104. Under Wis. Stat. § 11.30(4), candidate endorsements standing alone are not express advocacy: "This chapter shall not be construed to restrict . . . editorial comment or endorsement. Such activities need not be reported as a contribution or disbursement." Although plaintiff offers no other specific examples of express advocacy in which it would like to engage, the exhibits accompanying plaintiff's complaint contain samples of political advertisements produced and distributed in the past by plaintiff that represent the type of advocacy in which plaintiff would like to engage in the future. Taken in a light most favorable to plaintiff, these advertisements are close enough to the hazy margin separating the types of political speech delineated in *Buckley* to conclude that they satisfy plaintiff's burden to allege an intention to engage in express advocacy. Therefore, plaintiff possesses standing to litigate the "major purpose" issue.

Whether the plaintiff's claims are ripe for review must be measured using the two-factor test articulated by the Supreme Court in *Abbott Labs. v. Gardner*, 387 U.S. 136 (1967). The district court is required to "evaluate both the fitness of the issue for judicial resolution and the hardship to the parties of withholding judicial consideration."

Id. at 149. The first factor is whether the issue is purely legal. No factual dispute exists currently between the parties. The issue is a legal one: the constitutionality of Wisconsin campaign financing statutes identified in plaintiff's complaint and defendants' interpretation of them. Plaintiff's desire to engage in advocacy is well substantiated by the pleadings which, contrary to defendant's contention, set forth, specific examples of the type of advocacy in which plaintiff has engaged in the past and would like to engage in the future. The legal issues implicated by plaintiff's claims are quite broad. Plaintiff's challenge does not depend on exhaustion of an administrative procedure but is based on an objection to following any administrative procedure at all. Even though no actions for violation of Wisconsin campaign financing law have been brought against plaintiff, and none is pending, plaintiff need not risk civil and criminal liability to activate judicial review. *See Entertainment Concepts, Inc., III v. Maciejewski*, 631 F.2d 497, 500 (7th Cir. 1980). Little would be gained from further factual development.

In *Abbott Labs.*, 387 U.S. at 149-156, the Court evaluated hardship in light of two considerations: (1) whether the challenged statutes have a direct impact on the day-to-day activities of the plaintiff; and (2) the possible harm plaintiff stands to suffer if the court delays consideration. Because the statutes at issue produced "an immediate and significant change in the plaintiffs' conduct of their affairs with serious penalties attached to non-conformance," the Court found the case ripe for review. *Id.* at 153. Here, the Wisconsin campaign financing statutes exert a direct impact on plaintiff's day-to-day activities because they chill plaintiff's willingness to continue

engaging in issue advocacy. With respect to counts VI and IX, regarding whether disbursements associated with a recall petition should be characterized as issue or express advocacy, any delay in deciding this case could damage plaintiff's First Amendment rights irreparably by preventing plaintiff from taking part in the recall petition of Senators Feingold and Kohl.

Plaintiff's complaint is less specific regarding why delay in deciding the remaining claims would present a hardship. For example, plaintiff does not allege that engaging in forms of issue advocacy other than supporting the recall effort is critical at this time because of an upcoming election or referendum. Nevertheless, in the context of a First Amendment overbreadth attack on a statute, if "such statute is alleged presently to be 'chilling' protected expression, that allegation by definition meets the ripeness requirement[s] . . . " *Indiana Voluntary Firemen's Ass'n v. Pearson*, 700 F. Supp. 421, 427 (S.D. Ind. 1988) (citing *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 298 (1979)). In this case, Plaintiff's free speech rights are allegedly chilled. Plaintiff contends that it has refrained from engaging in any form of issue advocacy. If plaintiff resumes engaging in issue advocacy without first registering as a committee it could be subject to civil and criminal sanctions for violating Wisconsin campaign financing law. Consequently, I conclude that all counts of plaintiff's complaint are ripe for review.

E. Pullman Abstention

Federal courts are required to abstain from deciding a case that presents "difficult and unsettled questions of

state law," if the clarification of those questions by a state court might render unnecessary a ruling on the law's constitutionality by a federal court. *Hawaii Housing Auth. v. Midkiff*, 467 U.S. 229, 236 (1984) (citing *Railroad Comm'n of Texas v. Pullman Co.*, 312 U.S. 496 (1941)). *See also American Booksellers Ass'n v. Hudnut*, 771 F.2d 323, 327 (7th Cir. 1985) (abstention "is appropriate when state courts may clarify the meaning of a statute, thus sharpening the constitutional dispute and perhaps preventing an unnecessary constitutional adjudication"). The Supreme Court has acknowledged that, theoretically speaking, there is always a possibility that a state court ruling could result in the avoidance of a federal constitutional question. *Midkiff*, 467 U.S. at 237. Abstention should not be ordered, the Court cautions, " 'unless the statute is of an uncertain nature, and is obviously susceptible to a limiting construction.' " *Id.* (quoting *Zwicker v. Koota*, 389 U.S. 241, 251 n.14 (1967)). *Pullman* abstention is appropriate when a federal constitutional issue might be mooted or cast in a different posture if an undecided state law issue is resolved in a particular way. *E & E Hauling, Inc. v. Forest Preserve Dist. of DuPage County*, 821 F.2d 433, 436 (7th Cir. 1987). This court may decide on its own motion to abstain. *Waldron v. McAtee*, 723 F.2d 1348, 1351 (7th Cir. 1983). Thus, as with standing and ripeness, there is no persuasive force to plaintiff's suggestion that this court's consideration of abstention is in any way limited by the scope of issues addressed by defendants in their brief.

The prerequisites for abstention are satisfied with respect to counts I, II, IV – VII, IX and X. All turn in some way on the proper definition of a "committee" under Wis. Stat. § 11.01(4), which itself depends on how Wis. Stat.

§ 11.01(16) defines express advocacy. Plaintiff argues that this area of law is neither unsettled nor susceptible to a limiting construction because (1) the plain language of Wis. Stat. § 11.01(16) renders it unconstitutional and (2) *Crawford v. Whittow*, 123 Wis. 2d 174, 366 N.W.2d 155 (Ct. App. 1985), *rev. denied*, 123 Wis. 2d 549, 371 N.W.2d 376 (Wis. 1985), eliminates any possibility that the Wisconsin state courts will provide a narrowing construction.

Whether Wis. Stat. § 11.01(16) is unsettled for the purpose of *Pullman* abstention analysis is a question to be determined against the background of the Federal Election Campaign Finance Act, *Buckley* and other persuasive authority. Plaintiff notes correctly that in Wisconsin, reference to extrinsic matters such as the scope, history or context of a statute is disfavored so long as the statute's plain language is unambiguous. *See Zimmerman v. Department of Health and Social Services*, 169 Wis. 2d 498, 507, 485 N.W.2d 290, 293 (Ct. App. 1992); *State ex rel. Giroward v. Circuit Court*, 155 Wis. 2d 148, 154, 454 N.W.2d 792, 795 (1990). However, other canons of statutory construction articulated by the Wisconsin Supreme Court counsel against accepting plaintiff's proposition that this court confine its analysis solely to the statutory language in deciding whether the meaning of Wis. Stat. § 11.01 is unsettled. For example, a law passed by the Wisconsin legislature is to be sustained if any reasonable construction of the law can save it; doubts as to its validity are resolved in favor of the law. *In re Appointment of Revisor of Statutes*, 141 Wis. 592, 124 N.W. 670 (1910); *see also State ex rel. Harvey v. Morgan*, 30 Wis. 2d 1, 139 N.W.2d 585 (1966) (rather than impugning the motives of the legislature, the court will, if possible, construe the statutes so as to find

them in harmony with accepted constitutional principles). In addition, because Wisconsin's campaign financing laws are patterned after an analogous federal act, cases interpreting sections of the Federal Election Campaign Finance Act are persuasive authority in construing related Wisconsin provisions. *Kluth v. General Cas. Co. of Wisconsin*, 178 Wis. 2d 808, 817-818, 505 N.W.2d 442, 446 (Ct. App. 1993) (citing *Wisconsin's Environmental Decade, Inc. v. Public Service Comm'n*, 79 Wis. 2d 161, 174, 255 N.W.2d 917, 925 (1977) (where provision in state environmental statute was not considered previously by Wisconsin Supreme Court and statute was patterned after and identical to National Environmental Policy Act, cases construing federal act were persuasive authority for interpreting state statute).

Even if Wisconsin doctrines of statutory construction did not encourage this court to consult other persuasive authority, the operative consideration under the first prong of the *Pullman* doctrine is whether Wis. Stat. § 11.01 represents an unsettled question of state law. This inquiry is not restricted merely to whether the language of a particular statute presents any interpretive ambiguity. The state law question implicated in the parties' discussion of Wis. Stat. § 11.01 revolves around the proper definition of "express advocacy." Although plaintiff believes it is limited to so-called "magic words" such as "vote for," "vote against," "elect," or "defeat," defendants take a broader view, arguing that *Buckley* permits a case-by-case contextual analysis. Two federal courts of appeal have reached differing conclusions on this issue. *Compare Federal Election Comm'n v. Furgatch*, 807 F.2d 857 (9th Cir. 1987) (speech need not include any words listed

in *Buckley* to be express advocacy but when read as a whole and with limited reference to external events must be susceptible of no other reasonable interpretation than as exhortation to vote for or against specific candidate), *cert. denied*, 484 U.S. 850 (1987), *with Maine Right to Life v. Federal Election Comm'n*, 98 F.3d 1 (1st Cir. 1996) (Federal Election Commission violated the Federal Election Campaign Finance Act by adopting definition of "express advocacy" articulated by 9th Circuit in *Furgatch*), *petition for cert. filed*, 65 U.S.L.W. 3783 (U.S. May 14, 1997) (No. 96-1818). Wisconsin campaign financing laws are modeled after the Federal Election Campaign Finance Act and must be interpreted in light of case law generated by the federal act. Consequently, the ambiguity created by this circuit split casts a shadow of uncertainty over the definition of "express advocacy" under Wis. Stat. § 11.01.

Wisconsin campaign financing statutes are obviously susceptible to a narrowing construction. Wisconsin courts are likely to construe them in accordance both with the saving construction placed on analogous federal statutes in *Buckley* as well as with the rule of statutory construction favoring preservation of a statute in the face of a constitutional challenge. Ample persuasive authority exists in Wisconsin to support a narrowing construction. Six months following the publication of *Buckley*, the Attorney General of Wisconsin issued an advisory opinion counseling the Board to construe Wisconsin campaign financing laws in the same manner that the Supreme Court interpreted the Federal Election Campaign Finance Act. 65 Op. Att'y Gen. 145, 154 (1976). Attorney General opinions are a persuasive guide to the interpretation of a statute when, as is the case with Wis. Stat. § 11.01, the

legislature has subsequently amended the statute on several occasions without contradicting the opinion. *Green v. Jones*, 23 Wis. 2d 551, 558, 128 N.W.2d 1 (1964). The Attorney General advised that the express advocacy standard, "should be applied by the Board to all phases of political activity regulated under chapter 11." 65 Op. Att'y Gen. at 152. The Board embraced this position that same year in the form of an administrative rule that remains in effect today. It states that committees are subject to disclosure and record keeping requirements only if they make disbursements directly to candidates or "[m]ake expenditures for the purpose of expressly advocating the election or defeat of an identified candidate." Wis. Admin. Code § ELBD 1.28(2)(c). Administrative rules have the force and effect of laws in Wisconsin. *Law Enforcement Stds. Bd. v. Lyndon Station*, 101 Wis. 2d 472, 488-89, 305 N.W.2d 89 (1981).

The main purpose of the *Pullman* doctrine is served when a federal court avoids "declaring a state statute unconstitutional[ ] by giving the state courts a chance to interpret it narrowly." *Mazanec v. North Judson-San Pierre Sch. Corp.*, 763 F.2d 847 (7th Cir. 1985). There are four cases making their way through the Wisconsin courts that will test the validity of Wisconsin's definition of express advocacy. The most obvious way for these courts to interpret the definition of "express advocacy" in Wisconsin campaign financing law is to follow the precedent set in *Buckley*. Doing so will eliminate or significantly narrow the federal constitutional issues raised in plaintiff's complaint.

No Wisconsin court, including the court that decided *Crawford*, 123 Wis. 2d 174, 366 N.W.2d 155, has addressed

the "major purpose" and "express advocacy" issues implicated in this lawsuit. *Crawford* involved a group of elected state officials who allegedly violated Wis. Stat. § 11.33, which prohibits the use of public funds to finance mass mailings before an election. Because the court found the statute ambiguous, it limited the prohibition to mass mailings for "political purposes" as defined in Wis. Stat. § 11.01(16). The court acknowledged that "political purposes" is a lesser standard than the definition of "express advocacy" in *Buckley*. However, it also noted that "[t]he constitutional freedoms at issue in *Buckley* . . . do not come into play in sec. 11.33. The purpose of sec. 11.33 would be thwarted by requiring express advocacy as the threshold level of political activity." *Crawford*, 123 Wis. 2d at 182, 366 N.W.2d at 159. Plaintiff cannot credibly argue that *Crawford* resolves any ambiguity regarding the definition of express advocacy in Wis. Stat. § 11.01(16) when the opinion itself explicitly repudiates this proposition.

Invocation of the *Pullman* doctrine is disfavored when the practical effect of abstention is to delay the enforcement of federal rights. 1A James W. Moore et al., *Moore's Federal Practice Digest*, § 0.203[1] (2d ed. 1991). It is unclear whether courts must be particularly reluctant to order abstention in cases based on the First Amendment. *Compare City of Houston, Texas v. Hill*, 482 U.S. 451, 468 (1987) (abstention "is inappropriate for cases [where] . . . statutes are justifiably attacked on their face as abridging free expression") (quoting *Dombrowski v. Pfister*, 380 U.S. 479, 489-90 (1965)), *with Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 509-10 (1985) (O'Connor, J., joined by Chief Justice Burger and Justice Rehnquist,

concurring) (Supreme Court has never endorsed proposition that abstention is particularly disfavored in First Amendment cases). However, "[e]ven those judges who are acutely sensitive to [delay created by abstention] have approved its use where 'a state statute is susceptible of a construction that would avoid or significantly alter a constitutional issue . . . ' " *Waldron*, 723 F.2d at 1352 (quoting *United Farm Workers*, 442 U.S. at 314). Wisconsin courts reviewing the state campaign financing laws will likely adopt the standards articulated in *Buckley*, avoiding the constitutional issues presented by plaintiff in counts I, II, IV-VII, IX and X. Consequently, this court will abstain from deciding these issues pending their resolution in state court.

Abstention is also appropriate for counts III and VIII, in which plaintiff is challenging the actions of agents of the state in illegally defining political action committees, as opposed to the statutes themselves. The substantive question presented in each count turns in part on the definition of express advocacy, an unsettled area of law susceptible to a narrowing construction. Even if Wisconsin courts uphold the statutes at issue or apply a narrowing construction, the Board could go on to act in contravention of the established law. Under this scenario, the constitutional issues raised in counts III and VIII would not be settled or avoided and abstention would not be warranted. However, the only examples offered by plaintiff in support of its allegation that the Board is acting in violation of *Buckley* are the same cases arising out of the same advertisements currently before Wisconsin courts at this moment. Thus, if the Board predicates registration as a political action committee on illegal or

unconstitutional parameters, as plaintiff alleges, the state courts will know of its decision before the cases are decided.

Because abstention means that the exercise of federal jurisdiction is postponed as opposed to abdicated generally, the proper course of action for a district court invoking the *Pullman* doctrine is to retain jurisdiction pending resolution of the state court proceedings. *American Trial Lawyers Ass'n v. New Jersey Supreme Court*, 409 U.S. 467, 469 (1973) (citations omitted). Dismissal without prejudice is usually appropriate only if retaining jurisdiction will impede the bringing of suit in state court. *Harris County Commissioners Court v. Moore*, 420 U.S. 77, 88-89 (1975). There is no suggestion that any obstacles to state court jurisdiction exist should plaintiff choose to file a similar action in Wisconsin court. However, even if dismissal of the federal suit is not required for state court adjudication, district courts have the discretion to dismiss without prejudice when appropriate. *See Zwickler v. Koota*, 389 U.S. 241, 244 n.4 (1967); *Farley v. Farley*, 481 F.2d 1009, 1011 n.2 (3d Cir. 1973); *Nelson v. Southeastern Pennsylvania Transp. Auth.*, 420 F.Supp. 1375, 1381 (E.D. Pa. 1976); *Green v. Board of Municipal Employees' Officers' and Officials' Annuity and Benefit Fund of Chicago*, 879 F.Supp. 77 (N.D. Ill. 1995).

Dismissal without prejudice is appropriate in this case. The constitutional issues raised by plaintiff may be resolved through two means. Plaintiff may bring an action similar to this one in state court or it may await the outcome of the pending lawsuits. Either way, the choice of how to proceed is up to plaintiff. Rather than imposing an indefinite stay as plaintiff considers its options, I will

dismiss the case without prejudice with leave to reinstate, if necessary, following final adjudication of the issues in state court.

F. Conclusion

I conclude that plaintiff's claims are justiciable. They satisfy the burden plaintiff must meet in the context of a First Amendment pre-enforcement challenge by alleging that plaintiff's speech has been chilled; plaintiff intends to engage in forms of express and issue advocacy unconstitutionally prohibited under Wisconsin campaign financing law and by agents of the state; and the enforcement proceedings brought against similar organizations represent a credible threat of prosecution. I conclude that plaintiff's complaint presents unsettled questions of state law obviously susceptible to a narrowing construction by a state court. The presence of four pending cases in state circuit court involving the very issues raised by plaintiff in this lawsuit cautions strongly against examining the constitutionality of Wisconsin campaign financing law before a state court has had an opportunity to interpret it authoritatively. Accordingly, this court will abstain under the *Pullman* doctrine until the validity of plaintiff's challenges to the definition of a "committee" under chapter 11 are resolved either by these cases or by plaintiff itself, should it choose to bring its own state law case.

ORDER

IT IS ORDERED that the motion to dismiss of defendants Paradise, Niebler, Kranig, Brennan, Dickey, Halbrooks, McKay, Stevenson and Doyle for lack of

justiciability is DENIED on the grounds that plaintiff has standing to bring the claims alleged in its complaint and that these claims are ripe.

FURTHER, IT IS ORDERED that defendants' motion to abstain is GRANTED on the grounds that plaintiff's complaint raises constitutional challenges to uncertain areas of state law that are susceptible to a narrowing construction by a Wisconsin court. Plaintiff's complaint is DISMISSED without prejudice with leave to reinstate, if necessary, following adjudication of the federal constitutional challenges to Wisconsin campaign financing law in state court.

Entered this 16th day of September, 1997.

BY THE COURT:

/s/ Barbara B. Crabb
BARBARA B. CRABB
District Judge

APPENDIX C

United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

April 16, 1998.

Before

Hon. JOEL M. FLAUM, Circuit Judge

Hon. FRANK H. EASTERBROOK Circuit Judge

Hon. DIANE P. WOOD, Circuit Judge

WISCONSIN RIGHT TO LIFE, INC., *Plaintiff-Appellant,*	Appeal from the United States District Court for the Western District of Wisconsin.
No. 97-3668	
v.	No. 97-C-323-C Barbara B. Crabb, *Judge.*
GREGORY J. PARADISE, Chairman of the Wisconsin State Election Board, *et al.*, *Defendants-Appellees.*	

Order

Plaintiff-appellant filed a petition for rehearing and suggestion of rehearing en banc on March 27, 1998. No judge in regular active service has requested a vote on the suggestion of rehearing en banc,* and all of the judges on the panel have voted to deny rehearing. The petition for rehearing is therefore DENIED.

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* Judge Ripple took no part in the consideration or decision of this matter.

APPENDIX D

United States Court of Appeals

For The Seventh Circuit

Chicago Illinois 60604

JUDGMENT – WITH ORAL ARGUMENT

Date: March 13, 1998

BEFORE: Honorable JOEL M. FLAUM, Circuit Judge

Honorable FRANK H. EASTERBROOK, Circuit Judge

Honorable DIANE P. WOOD, Circuit Judge

No. 97-3668

WISCONSIN RIGHT TO LIFE, INCORPORATED,
Plaintiff - Appellant

v.

GREGORY J. PARADISE, in his official capacity as Chairman of the Wisconsin Elections Board, JOHN NIEBLER, in his official capacity as Vice-Chairman of the Wisconsin State Elections Board, BARBARA KRANIG, in her official capacity as Secretary of the Wisconsin State Elections Board, et al.,
Defendants - Appellees

Appeal from the United States District Court for the Western District of Wisconsin
No. 97 C 323, Barbara B. Crabb, Judge

The judgment of the District Court is VACATED, and this cause is REMANDED with instructions. The appellees recover costs, in accordance with the decision of this court entered on this date.

(1061-110393)

APPENDIX E

The First Amendment to the Constitution of the United States provides: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or of the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

Section One of the Fourteenth Amendment to the Constitution of the United States provides in pertinent part: " . . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

WIS. STATS. CHAPTER 11

11.01 Definitions. As used in this chapter:

* * *

(4) "Committee" or "political committee" means any person other than an individual and any combination of 2 or more persons, permanent or temporary, which makes or accepts contributions or makes disbursements, whether or not engaged in activities which are exclusively political, except that a "committee" does not include a political "group" under this chapter.

* * *

(7) (a) "Disbursement" means:

1. A purchase, payment, distribution, loan, advance, deposit, or gift of money or anything of value (except a loan of money by a commercial lending institution made by the institution in accordance with applicable laws and regulations in the ordinary course of business), made for political purposes. In this subdivision, "anything of value" means a thing of merchantable value.

* * *

(16) An act is for "political purposes" when it is done for the purpose of influencing the election or nomination for election of any individual to state or local office, for the purpose of influencing the recall from or retention in office of an individual holding a state or local office, for the purpose of payment of expenses incurred as a result of a recount at an election, or for the purpose of influencing a particular vote at a referendum. In the case of a candidate, or a committee or group which is organized primarily for the purpose of influencing the election or nomination for election of any individual to state or local office, for the purpose of influencing the recall from or retention in office of an individual holding a state or local office, or for the purpose of influencing a particular vote at a referendum, all administrative and overhead expenses for the maintenance of an office or staff which are used principally for any such purpose are deemed to be for a political purpose.

(a) Acts which are for "political purposes" include but are not limited to:

1. The making of a communication which expressly advocates the election, defeat, recall or retention of a clearly identified candidate or a particular vote at a referendum.

2. The conduct of or attempting to influence an endorsement or nomination to be made at a convention of political party members or supporters concerning, in whole or in part, any campaign for state or local office.

(b) A "political purpose" does not include expenditures made for the purpose of supporting or defending a person who is being investigated for, charged with or convicted of a criminal violation of state or federal law, or an agent or dependent of such a person.

* * *

11.05 Registration of political committees, groups and individuals. (1) COMMITTEES AND GROUPS. Except as provided in § 9.10(2)(d), every committee other than a personal campaign committee, and every political group subject to registration under § 11.23 which makes or accepts contributions, incurs obligations or makes disbursements in a calendar year in an aggregate amount in excess of $25 shall file a statement with the appropriate filing officer giving the information required by sub. (3). In the case of any committee other than a personal campaign committee, the statement shall be filed by the treasurer. A personal campaign committee shall register under sub. (2g) or (2r).

* * *

11.06 Financial report information; application; funding procedure. (1) CONTENTS OF REPORT. Except as provided in subs. (2), (3) and (3m) and §§ 11.05(2r) and 11.19(2), each registrant under § 11.05 shall make full reports, upon a form prescribed by the board and signed by the appropriate individual under sub. (5), of all contributions received, contributions or disbursements made, and obligations incurred. Each report shall contain the following information, covering the period since the last date covered on the previous report, unless otherwise provided:

* * *

(2) DISCLOSURE OF CERTAIN INDIRECT DISBURSEMENTS. Notwithstanding sub. (1), if a disbursement is made or obligation incurred by an individual other than a candidate or by a committee or group which is not primarily organized for political purposes, and the disbursement does not constitute a contribution to any candidate or other individual, committee or group, the disbursement or obligation is required to be reported only if the purpose is to expressly advocate the election or defeat of a clearly identified candidate or the adoption or rejection of a referendum. The exemption provided by this subsection shall in no case be construed to apply to a political party, legislative campaign, personal campaign or support committee.

* * *

11.38 Contributions and disbursements by corporations and cooperatives. (1) (a) 1. No foreign or domestic corporation, or association organized under ch. 185, may make any contribution or disbursement, directly or indirectly, either independently or through any political party, committee, group, candidate or individual for any purpose other than to promote or defeat a referendum.

* * *

11.60 Civil penalties. (1) Any person, including any committee or group, who violates this chapter may be required to forfeit not more than $500 for each violation.

(2) In addition to the penalty under sub. (1), any person, including any committee or group, who is delinquent in filing a report required by this chapter may be required to forfeit not more than $50 or one percent of the annual salary of the office for which the candidate is being supported or opposed, whichever is greater, for each day of delinquency.

(3) Notwithstanding sub. (1), any person, including any committee or group, who makes any contribution in violation of this chapter may be required to forfeit treble the amount of the contribution or portion thereof which is illegally contributed.

(4) Actions under this section arising out of an election for state office or a statewide referendum may be brought by the board or by the district attorney of the county where the violation is alleged to have occurred,

except as specified in § 11.38. Actions under this section arising out of an election for local office or local referendum may be brought by the district attorney of the county where the violation is alleged to have occurred. If a violation concerns a district attorney or circuit judge or candidate for such offices, the action shall be brought by the attorney general. If a violation concerns the attorney general or a candidate for such office, the governor may appoint special counsel under § 14.11(2) to bring suit in behalf of the state. The counsel shall be independent of the attorney general and need not be a state employe at the time of appointment.

(5) Any elector may file a verified petition with the board or the appropriate district attorney or both where the authority is concurrent under sub. (4), requesting that civil action under this chapter be brought against any person, committee or group. The petition shall allege such facts as are within the knowledge of the petitioner to show probable cause that a violation of this chapter has occurred.

11.61 Criminal penalties; prosecution. (1) (a) Whoever intentionally violates § 11.05(1), (2), (2g) or (2r), 11.07(1) or (5), 11.10(1), 11.12(5), 11.23(6) or 11.24(1) may be fined not more than $10,000 or imprisoned not more than 3 years or both.

(b) Whoever intentionally violates § 11.25, 1126, 1127(1), 1130(1) or 11.38 where the intentional violations

does not involve a specific figure, or where the intentional violation concerns a figure which exceeds $100 in amount or value may be fined not more than $10,000 or imprisoned not more than 3 years or both.

(c) Whoever intentionally violates any provision of this chapter other than those provided in par. (a) and whoever intentionally violates any provision under par. (b) where the intentional violation concerns a specific figure which does not exceed $100 in amount or value may be fined not more than $1,000 or imprisoned not more than 6 months or both.

(2) Except as provided in § 11.38(5), all prosecutions under this section shall be conducted by the district attorney of the county where the violation is alleged to have occurred. If the district attorney refuses to act upon a sworn complaint, or fails to act upon such a complaint within 60 days of the date on which the complaint is received, the attorney general may then conduct the prosecution under this section. If a violation concerns a district attorney or circuit judge or candidate for such offices, the prosecution shall be conducted by the attorney general. If a violation concerns the attorney general or a candidate for such office, the governor may appoint a special prosecutor under § 14.11(2) to conduct the prosecution in behalf of the state. The prosecutor shall be independent of the attorney general and need not be a state employe at the time of appointment.

* * *

11.66 Elector may compel compliance. Any elector may sue for injunctive relief to compel compliance with this chapter. Before commencing any action concerning a state office or statewide referendum, an elector shall file a verified complaint with the board alleging such facts as are within his or her knowledge to show probable cause to believe that a violation has occurred or is proposed to occur. If the board fails to commence an action within 10 days of the filing of the complaint, the elector may commence an action. Separate from any other bond which may be required by the court, the elector may be required to post a surety bond in an amount determined by the court sufficient to cover the actual costs, including reasonable attorney fees, of both parties. If the elector's action is not successful, he or she shall pay the costs of the action.

WISCONSIN ADMINISTRATIVE CODE
STATE ELECTIONS BOARD
CHAPTER ELBD 1. CAMPAIGN FINANCING
Current through Reg. No. 504 (December 1997)

ElBd 1.28 Scope of regulated activity; election of candidates.

(1) Definitions. As used in this rule:

(a) "Political committee" means every committee which is formed primarily to influence elections or which is under the control of a candidate.

(b) "Contributions for political purposes" means contributions made to 1) a candidate, or 2) a political committee or 3) an individual who makes contributions to a candidate or political committee or incurs obligations or makes disbursements for the purpose of expressly advocating the election or defeat of an identified candidate.

(2) Individuals other than candidates and committees other than political committees are subject to the applicable disclosure-related and recordkeeping-related requirements of ch. 11, Stats., only when they:

(a) Make contributions for political purposes, or

(b) Make contributions to any person at the request or with the authorization of a candidate or political committee, or

(c) Make expenditures for the purpose of expressly advocating the election or defeat of an identified candidate.

(3) Consistent with § 11.05(2), Stats., nothing in sub. (1) or (2) should be construed as requiring registration and reporting, under §§ 11.05 and 11.06. Stats., of an individual whose only activity is the making of contributions.

APPENDIX F

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN
AT MILWAUKEE

WISCONSIN RIGHT TO LIFE, INC.,

Plaintiff,

v.

GREGORY J. PARADISE, in his official capacity as Chairman of the Wisconsin State Elections Board; JOHN NIEBLER, in his official capacity as Vice-Chairman of the Wisconsin State Elections Board; BARBARA KRANIG, in her official capacity as Secretary of the Wisconsin State Elections Board; MICHAEL BRENNAN, in his official capacity as a member of the Wisconsin State Elections Board; WALTER DICKEY, in his official capacity as a member of the Wisconsin State Elections Board; DAVID HALBROOKS, in his official capacity as a member of the Wisconsin State Elections Board;

Cause No. 97-C-0376

VERIFIED COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

(Filed Apr. 14, 1997)

J. CURTIS McKAY, in his official capacity as a member of the Wisconsin State Elections Board; JUDD DAVID STEVENSON, in his official capacity as a member of the Wisconsin State Elections Board; and JAMES E. DOYLE, in his official capacity as Attorney General for the State of Wisconsin,

Defendants.

VERIFIED COMPLAINT FOR DECLARATORY & INJUNCTIVE RELIEF

Comes now Plaintiff Wisconsin Right To Life, Inc. ("WRL"), by counsel, and for its verified complaint against the Defendants states the following:

PRELIMINARY STATEMENT

This is a civil action for declaratory and injunctive relief arising under the Constitution of the United States. Plaintiff WRL is a nonprofit, nonstock, public interest Wisconsin corporation, which periodically engages in issue advocacy through voter guides, flyers, scorecards, press releases, and other such materials. It also publishes and distributes a newspaper to its members and to the general public. Editions of its newspaper state the positions of candidates on issues of public concern, and some

editions contain what might be viewed as express advocacy in the form of announcements of candidate endorsements. However, the major purpose of WRL is not to support the election or nomination of candidates for public office.

Prior to the most recent general election, organizations similar to Plaintiff WRL were temporarily restrained from distributing materials which contained only issue advocacy on the ground that such materials influenced elections; as a result, these organizations were required to register as "committees" under Wisconsin election law and were prohibited from distributing such materials without so registering. In addition, the Wisconsin State Election Board (hereafter "the Board") has recently ruled, in complaints brought against these organizations for distributing issue-oriented materials, that these materials, which contain only issue advocacy, contained "express advocacy" as it viewed the meaning of this term under the statute, and that as a result, these organizations were required to register as "committees" under Wisconsin election law, lest they be subject to civil and criminal penalties. In all legally relevant respects, the issue advocacy (as properly defined) materials which WRL publishes and distributes are identical to the materials distributed by these organizations. Furthermore, some editions of WRL's newspaper contain not only issue advocacy, but could be viewed ads containing express advocacy; thus, under the Board's interpretation of Wisconsin election law, WRL's publishing and distribution of such putative express advocacy materials would render it a "committee" under Wisconsin election law, even though

its major purpose is not the election or nomination of candidates for public office.

WRL contends that the definition of "committee" (hereafter "PAC") under Wisconsin election law, Wis. Stat. § 11.01(4) (1996), in conjunction with the definitions of "disbursement" and "political purpose" in Wis. Stat. §§ 11.01(7)(a) and (16) (1996), respectively, is unconstitutional on its face for encompassing issue advocacy, rather than being limited to only express advocacy, and for failing to incorporate the "major purpose" test from *Buckley v. Valeo*, 424 U.S. 1 (1976), thereby deeming to be PAC's those organizations whose major purpose is not the election or defeat of candidates. In the alternative, WRL asserts that, if the definition of "committee" under Wis. Stat. § 11.01(4) (1996), is not unconstitutional on its face, then the official policy of the Board to so interpret and enforce these statutes against organizations which engage in issue advocacy and whose major purpose is not the election or defeat of candidates is unconstitutional. *See Pembauer v. City Of Cincinnati*, 475 U.S. 469 (1986). WRL also asserts that the provisions of Wisconsin election law that authorize private persons and agents of the State to enjoin issue advocacy groups from publishing and distributing materials which might influence elections is an unconstitutional prior restraint. *New York Times Co. v. United States*, 403 U.S. 713, 714 (1971).

WRL also asserts that the prohibition on corporate disbursements in Wis. Stat. § 11.38 is unconstitutional on its face and as applied to WRL for prohibiting nonprofit corporations, which are organized and operated so that they will not corrupt the political process, from making independent expenditures in violation of *Federal Election*

Commission v. Massachusetts Citizens For Life, Inc., 479 U.S. 238 (1986) (*MCFL*). It also contends that the reporting requirements in Wis. Stat. § 11.06 is unconstitutional as applied to the monies WRL spends on the punitive express advocacy contained in its newspaper. *Cf. MCFL; Miami Herald Publishing Company v. Tornillo*, 418 U.S. 241 (1974).

Finally, via informal advisory opinions, the Board has advised WRL that under the definition of "committee" in Wis. Stat. § 11.01(4) (1996), in conjunction with the definitions of "disbursement" and "political purpose" in Wis. Stat. §§ 11.01(7)(a) and (16) (1996), respectively, WRL may discuss a possible recall election only until the filing of a registration statement of an intent to circulate a petition for recall; at that point, any communications which WRL makes concerning such an election transmogrify into political speech which may only be made by PAC's. Thus, while WRL intends to make expenditures concerning the recall petition of Senators Kohl and Feingold, filed April 4, 1997, it is currently prohibited from doing so without registering as a PAC.

With regard to recall elections, then, WRL contends that the definition of "committee" in Wis. Stat. § 11.01(4) (1996), in conjunction with the definitions of "disbursement" and "political purpose" in Wis. Stat. §§ 11.01(7)(a) and (16) (1996), respectively, is unconstitutional on its face for being based on issue advocacy, rather than express advocacy, and for failing to incorporate the "major purpose" test from *Buckley v. Valeo*, 424 U.S. 1 (1976). In the alternative, WRL asserts that if the definition of "committee" under Wis. Stat. § 11.01(4)(1996), in conjunction with the definitions of "disbursement" and

"political purpose" in Wis. Stat. §§ 11.01(7)(a) and (16) (1996), respectively, is not unconstitutional on its face, then the official policy of the Board to so interpret and enforce these statutes in the context of recall elections in unconstitution. *See Pembauer v. City Of Cincinnati*, 475 U.S. 469 (1986).

The Plaintiff seeks to have the challenged statutes declared unconstitutional on their face and as they apply to it for being overbroad in violation of the First and Fourteenth Amendments Plaintiff also seeks to have their enforcement preliminarily and permanently enjoined. It is important that these issues be resolved promptly so that the Plaintiff and those similarly situated will not be chilled in their free expression and association or risk being unlawfully enjoined for founding violation of Wisconsin election law as a result of having engaged in constitutionally-protected political expression in the most recent election and to ensure that they will be able to resume their issue advocacy in the upcoming elections.

I.

JURISDICTION

1. This action arises under Section 1 of the Civil Rights Act of 1871, 17 Stat. 13, 42 U.S.C. § 1983, and the First and Fourteenth Amendments to the Constitution of the United States.

2. The jurisdiction of this Court over the claims arising under 42 U.S.C. § 1983 is founded on 28 U.S.C. §§ 1331 and 1343(a). The jurisdiction of the Court over the claims arising under the First and Fourteenth Amendments is founded on 28 U.S.C. §§ 1331 and 1343(a).

3. Venue in this district is proper under 28 U.S.C. § 1391(b) because Defendants Niebler, Brennan, Halbrooks, McKay, and Stevenson reside in the Eastern District of Wisconsin.

II.

PARTIES & INTERESTS AFFECTED

4. Plaintiff Wisconsin Right To Life, Inc., is a statewide, nonprofit, nonstock, membership Wisconsin corporation, exempt from federal income tax under § 501(c)(4) of the Internal Revenue Code (codified at 26 U.S.C.). *See Articles Of Incorporation, attached hereto as Exhibit A.* WRL has an internal political action committee. It is not associated with any political candidate, political party, or campaign committee. It was incorporated to promote pro-life issues. Its purposes are thus to educate the general public on issues relating to the protection of individual human life, regardless of stage of development or state of dependency, and to promote the pro-life cause in all legal ways. It is not the major purpose of WRL to support the election or nomination of candidates for public office. WRL's principal office is in Milwaukee, Wisconsin, but it has local chapters and members throughout Wisconsin. WRL brings this action on its own behalf, on behalf of its members and on behalf of its local chapters.

5. WRL has no shareholders or members which receive any financial benefit from their membership, other than receipt of newspapers and informational brochures which are available to anyone on request. Thus, WRL's members have no economic disincentive to disassociate from it due to its issue advocacy.

6. WRL does not accept contributions from business corporations for its general fund, nor has it accepted any contributions from labor unions into its general fund. WRL thus does not serve as a conduit for such dollars.

7. In addition, WRL has engaged in traditional fundraising activities of not-for-profit corporations, such as direct mail and telemarketing appeals to existing, lapsed, or potential members, and it engages in minor business activities which are incidental, and related, to its advocacy of issues, such as receiving special event revenue from the price of admission to its conventions, revenue from distributing pro-life literature, and revenue for renting its mailing list to candidates who have been endorsed by its internal political action committee. The annual revenue generated from such activities is minor in relation to the total revenue WRL generates each year. For example, the revenue WRL generated from such incidental business activities amounted to 5.28% of its total annual revenue in 1996; it amounted to 1.60% of its total annual revenue in 1995; it amounted to 5.65% of its total annual revenue in 1994; and it amounted to 1.98% of its total annual revenue in 1993. Thus, WRL is overwhelmingly funded by private, individual donations/contributions. All of its fundraising efforts are done in the name of WRL and donors/contributors clearly understand that their funds are going for the issue and minor amounts of what might be viewed as express advocacy in which WRL engages.

8. Defendant Gregory J. Paradise is sued in his official capacity as Chairman of the Wisconsin State Election Board. John Niebler is sued in his official capacity as Vice-Chairman of the Wisconsin State Election Board.

Barbara Kranig is sued in her official capacity as Secretary of the Wisconsin State Election Board. Michael Brennan, Walter Dickey, David Halbrooks, J. Curtis McKay, and Judd David Stevenson, are sued in their official capacities as Members of the Wisconsin State Election Board. Under Wis. Stat. § 11.60(4), the Board may bring an action for civil penalties for violations of Wisconsin election law that pertain to an election for state office or to a statewide referendum, including the provisions at issue in this lawsuit. *See Copy Of Chapter 11, "Campaign Finance," attached hereto as exhibit B.* These persons act under color of state laws in deciding whether to enforce Wisconsin's election laws.

9. Defendant James E. Doyle is sued in his official capacity as Attorney General for the State of Wisconsin. Under Wis. Stat. § 11.60(4), he may bring an action for civil penalties for violations of Wisconsin election law that pertain to a district attorney, circuit judge, or a candidate for such office, including the provisions at issue in this lawsuit. In addition, under Wis. Stat. § 11.61(2), he may bring a criminal action for violations of Wisconsin election laws, including the provisions at issue in this lawsuit, if the district attorney refuses to act upon a sworn complaint or fails to act within sixty (60) days from the date a complaint is received. Under this section, he may also bring a criminal action if a violation of Wisconsin election law concerns a district attorney, circuit judge, or a candidate for such office. He acts under color of state law in deciding to enforce Wisconsin's election laws.

III.
RELEVANT STATUTES, ACTIONS OF DEFENDANTS & OTHERS, AND OTHER FACTS

10. In the past, and as part of its educational activities, WRL has prepared and distributed issue advocacy materials, such as voter guides/scorecards (*example attached hereto as exhibit C*), flyers (*attached hereto as exhibit D*) and press releases (*examples attached hereto as exhibit E*). It wishes to continue to do so in the future. These materials influence candidate elections by setting forth the candidates' positions on issues of public importance. While these materials influence elections, they only contain issue advocacy; they do not expressly advocate the election or defeat of clearly identified candidates, nor do they endorse candidates.

11. Wisconsin defines "committee" or "political committee," in pertinent part, as "any person other than an individual and any combination of 2 or more persons, permanent or temporary, which makes or accepts contributions or makes disbursements, whether or not engaged in activities which are exclusively political . . . " Wis. Stat. § 11.01(4).

12. Wisconsin defines "disbursement" in pertinent part as, *inter alia*, "a purchase, payment, distribution, loan, advance, deposit, or gift or money or anything of value . . . made for political purposes." Wis. Stat. § 11.01(7)(a).

13. Wisconsin defines an act to be for a "political purpose" when, *inter alia*, "it is done for the purpose of influencing the election or nomination for election of any individual to state or local office . . . or the purpose of

influencing a particular vote at a referendum." Wis. Stat. § 11.01(16). Wisconsin also provides that "[a]cts which are for 'political purposes' include but are not limited to," *inter alia*, "the making of a communication which expressly advocates the election, defeat, recall or retention of a clearly identified candidate or a particular vote at a referendum," as well as "the conduct of or attempting to influence an endorsement or nomination to be made at a convention of political party members or supporters concerning, in whole or in part, any campaign for state or local office." Wis. Stat. § 11.01(16)(a).

14. Under Wisconsin election law, then, Plaintiff WRL is a "committee" because it is a "combination of 2 or more persons . . . which makes or accepts *disbursements*," Wis. Stat. § 11.01(4) (emphasis added), which include any "payment" or "distribution . . . *made for political purposes*," Wis. Stat. § 1.01(7)(a) (emphasis added), which, in turn, are those acts which are "done *for the purpose of influencing* the election . . . of any individual to state or local office." Wis. Stat. § 11.01(16) (emphasis added). In other words, WRL is a "committee" because it is a group of persons that spends money to influence elections. This is so, even though the activities in which it engages are not "exclusively political," Wis. Stat. § 11.01(4), i.e., it engages in educational activities as well, and even though its "major purpose" is not the election or nomination of candidates. *Buckley*, 424 U.S. at 79.

15. Because WRL spends more than $25 total in a calendar year to influence elections, under Wisconsin election law it is a "committee" that is required to register. Wis. Stat. § 11.05(1).

16. If WRL does not register, it is prohibited by Wisconsin election law from making any disbursements, i.e., from spending any money to "influence elections." Wis. Stat. § 11.12(1).

17. Under Wis. Stat. § 11.60(5), "[a]ny elector may file a verified petition with the board or the appropriate district attorney or both . . . requesting that civil action . . . be brought against any person, committee or group [for a violation of the aforementioned provisions]." If the Board fails to take action after an elector files a verified complaint, then under Wis. Stat. § 11.66, the "elector may sue for injunctive relief to compel compliance with [the aforementioned election law provisions]."

18. Prior to the 1996 general election, several organizations – similar to the Plaintiff WRL in that they are primarily issue advocacy groups – engaged in issue advocacy by running and distributing advertisements concerning candidates for political office. *See Statements Of Facts In Complaints Nos. 96-35, 96-37, 96-38, 96-39, 96-40, and 96-41 Before The Wisconsin State Election Board, attached hereto as exhibit F.*

19. Within a few weeks prior to this election, the persons who were targeted by these advertisements brought several lawsuits in state court against these organizations. *See Pleadings and Orders in* Travis v. Americans For Limited Terms (No. 96-CV-2581), *in* State of Wisconsin ex rel. WMC Issues Mobilization Council, Inc., v. Circuit Court For Dayne County (No. 96-3133-W), *and in* State of Wisconsin ex rel. WMC Issues Mobilization Council, Inc. v. Circuit Court For Milwaukee County (No. 96-3139-W), *attached hereto as exhibit G.* The gravamen of

these lawsuits was that in running and distributing these issue-oriented advertisements, these organizations were spending money to "influence elections." As a result, they were required to register as "committees" under Wisconsin election law. *See, inter alia,* Wis. Stat. §§ 11.01(16) and 11.05(1), *supra.* If these organizations did not register, they were prohibited from making any such disbursements. *See* Wis. Stat. § 11.12(1). Those persons who brought these lawsuits sought and received from Wisconsin state courts temporary restraining orders and injunctions which enjoined these organizations from continuing to run or distribute their issue advocacy advertisements. *Id.*

20. The persons who were targeted by these advertisements also inquired to the Board regarding the legality of the aforementioned issue advocacy advertisements. While the Board declined to issue a formal advisory opinion regarding such advertisements, the Board's legal counsel, via informal advisory opinions, advised these persons that the advertisements in question were constitutionally protected issue advocacy which could not be regulated and which could not serve as a basis for deeming an organization to be a PAC and thus requiring it to register. Nevertheless, contemporaneously with filing these state court actions, the persons targeted by these advertisements filed formal complaints with the Board. *See Statements Of Facts In Complaints Nos. 96-35, 96-37, 96-38, 96-39, 96-40, and 96-41 Before The Wisconsin State Election Board, attached hereto as exhibit F.*

21. In a detailed and well-thought-out memorandum to the Board dated March 13, 1997 – the date of the hearing on these formal complaints – the Board's legal

counsel advised the Board that the advertisements in question were constitutionally protected issue advocacy which could not be regulated and which could not serve as a basis for deeming an organization to be a PAC and thus requiring it to register. *See Memorandum From George A. Dunst, Legal Counsel, To Members Of Wisconsin State Election Board, dated 3/13/97, attached hereto as exhibit H.*

22. Nevertheless, the following day, the Board, in a 6-2 decision, ruled that the advertisements in question were express advocacy, not issue advocacy, and that as a result, these organizations were required under Wisconsin election law to register as PAC's by April 15, 1997. *See Orders and Opinions of Wisconsin State Election Board in Complaints Nos. 96-35, 96-37, and 96-38, attached hereto as exhibit I.*

23. In all legally relevant respects, the issue advocacy materials prepared and distributed by WRL are identical to the issue advocacy materials prepared and distributed by the aforementioned organizations.

24. WRL does not wish to be forced to register as a "committee" because of: a) the undue burden of doing so; b) its concern that its tax exempt status might be jeopardized with the Internal Revenue Service by such registration because a 501(c)(4) tax exempt entity may not have as its major purpose political activity; and c) its liability for tax on its expenditures for its issue advocacy materials it they are deemed express advocacy.

25. WRL wishes to continue to publish and distribute such issue advocacy materials in the future without having to register. However, it is chilled in its willingness to do so – and will in fact not do so – because these

similar organizations have been: a) sued in state court for publishing and distributing similar materials or the ground that because such materials "influence elections," these organizations are required to register as PAC's under Wisconsin election law and are prohibited from engaging in issue advocacy if they do not do so; and b) the subject of formal complaints filed with the Board and have been ordered by the Board to register as PAC's because of their issue advocacy.

26. To avoid both the civil and criminal penalties (discussed, *infra*) for violating Wisconsin election law, i.e., for spending money on materials which influence elections without registering as a PAC and reporting its activities, as well as the time and expense of having to defend against state court and administrative actions, WRL will no longer engage in such protected expression. Furthermore, WRL fears that it is *presently* subject to civil and criminal penalties, as well as the time and expense of defending against state court and administrative actions, due to its *past* activities: WRL has already spent money on materials which "influence elections" without registering as a PAC and reporting its activities.

27. WRL also regularly publishes and regularly distributes a newspaper to its members and to the general public. Editions of this newspaper are published through WRL's regular facilities by staff which regularly works on these editions. WRL's masthead appears on each edition of this newspaper, and each edition contains "a volume and issue number identifying it as one in a continuing series." *MCFL*, 479 U.S. at 251.

28. Most editions of this newspaper contain only issue advocacy (*example attached hereto as exhibit J*); while these editions may influence elections because of their articles and other features, such as scorecards, they do not expressly advocate the election or defeat of clearly identified candidates, nor do they endorse candidates.

29. However, some editions of WRL's newspaper do contain what might be regarded as express advocacy, as well as issue advocacy, in the form of announcements of candidate endorsements which do not request the election or defeat of specific candidates. *See example attached hereto as exhibit K.*

30. Under Wisconsin election law, corporations are prohibited from making "any contribution or disbursement, directly or indirectly, either independently or through any political party, committee, group, candidate or individual for any purpose other than to promote or defeat a referendum." Wis. Stat. § 11.38(1). "Any corporation which violates this section shall forfeit double the penalty assessed under [Wis. Stat.] § 11.60(3) [discussed, *infra*]." Wis. Stat. § 11.38(4). Thus, under Wis. Stat. § 11.38, WRL is prohibited from making any independent expenditures concerning candidates, including the monies it spends on those editions of its newspaper which contain what might be viewed as express advocacy, i.e., announcements of candidate endorsements.

31. WRL would like to continue to publish and distribute editions of its newspaper which contain announcements of candidate endorsements and to engage

in other forms of what might be viewed as express advocacy. However, because of the prohibition in Wis. Stat. § 11.38(1) against corporations making independent expenditures, it is chilled in its willingness to do so and will in fact no longer make any expenditures which may be regarded as independent expenditures. In short, it will cease engaging in such protected expression in order to avoid both the civil and criminal penalties (discussed, *infra*) for violating Wis. Stat. § 11.38(1), as well as the time and expense of having to defend against state court and administrative actions. Furthermore, WRL fears that it is *presently* subject to civil and criminal penalties, as well as the time and expense of defending against state court and administrative actions, due to its *past* activities: WRL has already spent money on editions of its newspapers which contain what might be viewed as independent expenditures in the form of announcements of candidate endorsements.

32. WRL spends more than $1,000 on issue advocacy and on what may be regarded as express advocacy per calendar year in order to influence elections.

33. WRL wishes to continue to spend more than $1,000 annually in order to engage primarily in issue advocacy, as well as in a minor amount of what might be viewed as express advocacy, via the aforementioned means, without the undue burden on its rights to free expression and association imposed by having to register and report as a "committee," as required by Wisconsin election law (discussed, *infra*), with the attendant risk to its tax-exempt status from such a designation.

34. Under Wisconsin election law, a registrant is required to "make full reports . . . of all contributions received, contributions or disbursements made, and obligations incurred." Wis. Stat. § 11.06(1). However, if "a disbursement is made or obligation incurred by an individual other than a candidate or by a committee or group which is not primarily organized for political purposes, and the disbursement does not constitute a contribution to any candidate or other individual, committee or group, the disbursement or obligation is required to be reported only if the purpose is to expressly advocate the election or defeat of a clearly identified candidate or the adoption or rejection of a referendum." Wis. Stat. § 11.06(2).

35. Because WRL is not primarily organized for political purposes, once it registers, and once the ban on corporation disbursements in Wis. Stat. § 11.38(1) is enjoined, it would have to report all of its putatively "independent expenditures," including the monies spent on what might be viewed as express advocacy in editions of the newspaper it publishes. Because of the burdens on WRL from having to report such monies, it does not wish to do so. But because of the civil and criminal penalties (discussed, *infra*) for violating Wis. Stat. § 11.06, as well as the time and expense of having to defend against state court and administrative actions, if it does file such reports, WRL will cease publishing editions of its newspaper which contain anything which might be regarded as express advocacy. Furthermore, WRL fears that it is *presently* subject to civil and criminal penalties, as well as the time and expense of defending against state court and administrative actions, due to its *past* activities: WRL has already spent money on editions of its newspapers which

contain putative "independent expenditures" in the form of announcements of candidate endorsements without reporting the monies that it has spent doing so.

36. WRL is and has been supporting the recall of the current United States Senators from Wisconsin, Russ Feingold and Herb Kohl, because of their votes against banning partial birth abortions. *See WRL Materials Pertaining To The Recall Of Senators Feingold & Kohl, attached hereto as exhibit* L. In this regard, it intends to spent [sic] more than $1,000 in order to influence the recall of these senators from their offices. *Id.*

37. Wisconsin also defines an act to be for a "political purpose" when "it is done . . . for the purpose of influencing the recall from or retention in office of an individual holding a state or local office, [or] for the purpose of payment of expenses incurred as a result of a recount at an election." Wis. Stat. § 11.01(16). As noted, Wisconsin also provides that "[a]cts which are for 'political purposes' include but are not limited to," *inter alia*, "the making of a communication which expressly advocates the . . . recall or retention of a clearly identified candidate." Wis. Stat. § 11.01(16)(a).

38. In an informal advisory opinion of December 6, 1995, which, in turn, references a prior informal advisory opinion of June 16, 1995, the Board's legal counsel advised agents of WRL that under Wisconsin election law, WRL could only spend money on communications concerning the recall of a current officeholder prior to the filing of a statement of an intent to circulate a petition for recall. See Letters of 12/6/95 To Susan M. Armacost of WRL and of 6/16/95 To Vincent P. Lyles, attached hereto

as exhibit M. However, after the filing of the recall statement of intent, WRL would be prohibited under Wisconsin election law from engaging in *any discussion, including* disseminating literature that contained only issue advocacy regarding the recall or literature that expressly advocates the recall from office of a current officeholder, *until it registers as a "committee."*

39. A statement of an intent to circulate a petition for recall of Senators Fiengold and Kohl was filed on April 4, 1997. WRL would like to spend money on both issue advocacy and what might be considered express advocacy communications concerning the recall of Senators Fiengold and Kohl. However, WRL may only do so if it registers as a "committee." Because WRL does not want to register as a "committee," nor does it want to run afoul of Wisconsin law – with the resultant civil and criminal penalties and the attendant time and expense of having to defend itself in state court and administrative proceedings – WRL is chilled in its willingness to make such communications and will in fact not make such communications at this time.

40. Under Wis. Stat. § 11.60(1), "[a]ny person, including any committee or group, who violates [these provisions] may be required to forfeit not more than $500 for each violation." In addition, "any person, including any committee or group, who is delinquent in filing a report . . . may be required to forfeit not more than $50 or one percent of the annual salary of the office for which the candidate is being supported or opposed, whichever is greater, for each day of delinquency."

41. Under Wis. Stat. § 11.61(1)(a), "[w]hoever intentionally violates [Wis. Stat.] § 11.05(1), (2), (2g) or (2r) . . . may be fined not more than $10,000 or imprisoned not more than 3 years or both." In addition, under Wis. Stat. § 11.61(1)(b), "[w]hoever intentionally violates [Wis. Stat.] § . . . 11.38 where the intentional violation does not involve a specific figure, or where the intentional violation concerns a figure which exceeds $100 in amount or value may be fined not more than $10,000 or imprisoned not more than 3 years or both." Finally, under Wis. Stat. § 11.61(1)(c), "[w]hoever intentionally violates any [of the aforementioned] provision[s] . . . other than those provided in par. (a) and whoever intentionally violates any provision under par. (b) where the intentional violation concerns a specific figure which does not exceed $100 in amount or value may be fined not more than $1,000 or imprisoned not more than 6 months or both."

42. For the reasons set forth herein, Plaintiff WRL believes that the challenged provisions are unconstitutional and cannot be legally enforced. However, it is chilled in exercising its right to engage in protected issue-oriented speech because it fears the Defendants will attempt to enforce these provisions against them, thereby subjecting them to the burden and expense of defending themselves and the potential risk of criminal and civil penalties in the event that the provisions are held to be valid.

43. There exists an actual, justiciable controversy among these parties as to the validity of the aforementioned statutes.

44. The Plaintiff has no adequate remedy at law, and, as a result of these provisions, they have suffered, and will continue to suffer irreparable harm due to the deprivation of their First and Fourteenth Amendment rights by the unconstitutional restraint of their freedom of speech and association, as guaranteed by the Constitution of the United States.

IV.

COUNT I

45. The Plaintiff realleges the preceding paragraphs.

46. Issue advocacy is discussing one's views regarding public issues related to candidates without expressly advocating the election or defeat of any candidate. *Buckley*, 424 U.S. at 41-44.

47. Express advocacy is expressly "advocating the election or defeat of a clearly identified candidate." *Id.* at 44.

48. Issue advocacy may not be burdened or restricted. *Id.* at 41-44.

49. To protect issue advocacy, the Supreme Court has held that only those organizations which make contributions to candidates or which engage in independent expenditures, i.e., expenditures which expressly advocate the election or defeat of candidates, can be required to register as political committees. *Id.* at 79.

50. As noted, issue advocacy materials, such as voter guides, scorecards, and press releases, may certainly "influence elections" by setting forth candidates'

positions on issues of public concern, and Plaintiff WRL spends money to publish and distribute such materials for this purpose.

51. As also noted, under Wisconsin election law, Plaintiff WRL is thus a "committee": it "makes or accepts *disbursements*," Wis. Stat. § 11.01(4) (emphasis added), which are "payment[s]" or "distribution[s] . . . *made for political purposes*," Wis. Stat. § 11.01(7)(a) (emphasis added), which, in turn, are those acts which are "done *for the purpose of influencing* the election . . . of any individual to state or local office." Wis. Stat. § 11.01(16) (emphasis added). In other words, WRL is a "committee" because it spends money to influence elections.

52. Because WRL is a "committee" that spends more than $25 total in a calendar year to influence elections, under Wisconsin election law it is required to register. Wis. Stat. § 11.05(1).

53. If WRL does not register, it is prohibited by Wisconsin election law from making any disbursements, i.e., from spending any money to "influence elections" Wis. Stat. § 11.12(1).

54. If WRL spends money to "influence elections" without registering, it will be subject to civil and criminal penalties under Wis. Stat. §§ 11.60 and 11.61, respectively.

55. As a result of these requirements, Plaintiff WRL is effectively barred from engaging in constitutionally protected issue advocacy because it does not want to bear the burden of having to register, risk losing its tax exempt status by being viewed as a "committee," or suffer criminal and civil penalties for engaging in issue advocacy

without registering. This burden – as well as the civil and criminal penalties for failing to comply with these requirements – deters WRL from engaging in protected issue advocacy, and it in fact will not do so.

56. Because Wis. Stat. § 11.01(4), in conjunction with the definitions of "disbursement" and "political purpose" in Wis. Stat. §§ 11.01(7)(a) and (16) (1996), respectively, deems organizations which make disbursements greater than $25 to "influence elections" to be "committees," it is overbroad for sweeping in issue advocacy groups, i.e., for being predicated on issue, rather than express, advocacy.

57. Wis. Stat. § 11.01(4) is substantially overbroad, *Broadrick v. Oklahoma*, 413 U.S. 601, 615 (1973), because it defines all issue advocacy groups which spend over $25 to influence elections to be "committees." As a result, the statute is unconstitutional on its face.

58. In the alternative, if Wis. Stat. § 11.01(4) is not unconstitutionally overbroad, then it is unconstitutionally vague both because it does not provide "fair notice" of what conduct is illegal, *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972), and it vests the Defendants with the discretion to enforce the law in an arbitrary and discriminatory manner. *Kolender v. Lawson*, 461 U.S. 352, 357 (1983).

WHEREFORE, Plaintiff WRL respectfully prays the Court to:

(1) Declare Wis. Stat. § 11.01(4) unconstitutional on its face;

(2) Prohibit, by way of preliminary and permanent injunction, the Defendants, their agents, and successors

from enforcing Wis. Stat. § 11.01(4) against WRL as well as against its agents, officers, and employees;

(3) Grant them their costs of this action, including reasonable attorney's fees, pursuant to 42 U.S.C. § 1988 and any other applicable authority; and

(4) Grant them such other relief as may be just and equitable.

V.

COUNT II

59. The Plaintiff realleges the preceding paragraphs.

60. To protect issue advocacy, the Supreme Court has also held that in order for an organization to be deemed a political committee, and thereby required to register as such and report all of its financial activities, not only must it engage in express advocacy, but its *major purpose* must be the election or nomination of candidates for public office. *Buckley,* 424 U.S. at 79.

61. Under Wis. Stat. § 11.01(4), however, WRL is a "committee" because it make [sic] disbursements greater than $25 during a calendar year to "influence elections," even though its major purpose is not the election or nomination of candidates for public office.

62. As a result, under Wis. Stat. § 11.05(1), WRL must register. If it does not do so, it would be subject to civil and criminal penalties under Wis. Stat. §§ 11.60 and 11.61, respectively, if it made any disbursements which "influence elections." Complying with this registration requirements would burden the exercise of WRL's First

Amendment rights and would cause WRL to risk losing its tax exempt status by being viewed as a "committee."

63. This burden and risk – as well as the civil and criminal penalties for violating § 11.05(1) – deters WRL from engaging in protected issue advocacy, and it in fact will not do so.

64. Because Wis. Stat. § 11.01(4) treats WRL as a "committee," despite the fact that its major purpose is not to nominate or elect candidates (or pass or defeat ballot measures), it is overbroad.

65. Because Wis. Stat. § 11.01(4) defines as a PAC organizations whose major purpose is not the election or nomination of candidates for public office (or the passage or defeat of ballot measures), it is substantially overbroad. *Broadrick v. Oklahoma*, 413 U.S. 601, 615 (1973). As a result, the statute is unconstitutional on its face.

66. In the alternative, if Wis. Stat. § 11.01(4) is not unconstitutionally overbroad, then it is unconstitutionally vague both because it does not provide "fair notice" of what conduct is illegal, *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972), and because it vests the Defendants with the discretion to enforce the law in an arbitrary and discriminatory manner. *Kolender v. Lawson*, 461 U.S. 352, 357 (1983).

WHEREFORE, Plaintiff WRL respectfully prays the Court to:

(1) Declare Wis. Stat. § 11.01(4) unconstitutional on its face;

(2) Prohibit, by way of preliminary and permanent injunction, the Defendants, their agents, and successors

from enforcing Wis. Stat. § 11.01(4) against WRL, as well as against its agents, officers, and employees;

(3) Grant them their costs of this action, including reasonable attorney's fees, pursuant to 42 U.S.C. § 1988 and any other applicable authority; and

(4) Grant them such other relief as may be just and equitable.

VI.

COUNT III

67. The Plaintiff realleges the preceding paragraphs.

68. Under *Pembaur v. Cincinnati*, 475 U.S. 469, 479-80 (1986), an official policy of an agency exists by virtue of the actions of the head of the agency, and such a policy may be declared unconstitutional and enjoined if it violates the federal constitution. *See also City of Oklahoma City v. Tuttle*, 471 U.S. 808, 823-24 (1985).

69. In the alternative, then, if Wis. Stat. § 11.01(4) does not define Plaintiff WRL as a "committee," then agents of the State – Defendants members of the Board – have so interpreted and applied this statute. More specifically, Defendants members of the Board are the head of this agency. Through their rulings of 3/13/97 and 3/14/97, they have made it the official policy of the state to require groups which spend more than $25 to "influence elections" to register as "committees," even if they do not engage in any express advocacy and regardless of their major purpose.

70. Because, as noted, it is unconstitutional to predicate a registration requirement on issue advocacy and regardless of an organizations major purpose, *Buckley*, 424 U.S. at 79, this policy is unconstitutional and should be declared unlawful and enjoined.

WHEREFORE, Plaintiff WRL respectfully prays the Court to:

(1) Declare the official policy of the State of Wisconsin that groups which spend more than $25 to "influence elections" are committees which must register to be unconstitutional;

(2) Prohibit, by way of preliminary and permanent injunction, the Defendants, their agents, and successors from enforcing this policy against WRL, as well as against its agents, officers, and employees;

(3) Grant it its costs of this action, including reasonable attorney's fees, pursuant to 42 U.S.C. § 1988 and any other applicable authority; and

(4) Grant it such other relief as may be just and equitable.

VII.

COUNT IV

71. The Plaintiff realleges the preceding paragraphs.

72. The Supreme Court has stated that "[p]rior restraint upon speech suppresses the precise freedom which the First Amendment sought to protect against abridgement." *Carroll v. President and Commissioners of Princess Anne*, 393 U.S. 175, 181 (1968). In this regard, the

Supreme Court has stated that constitutionally permissible prior restraints occur only in "exceptional cases." *Near v. Minnesota*, 283 U.S. 697, 716 (1931). More specifically, the Court has held that: a) any "system of prior restraints comes to this Court with a heavy presumption against its constitutional validity," and b) the Government carries a "heavy burden" to justify enforcing any system of prior restraint. *New York Times Co. v. United States*, 403 U.S. 713, 714 (1971).

73. A prior restraint resulting in a delay in speech "of even a day or two" may be intolerable when applied "to 'political' speech in which the elements of timeliness may be important." *Carroll*, 393 U.S. at 182. *See also Capital Cities Media, Inc. v. Toole*, 463 U.S. 1303, 1304 (1983) ("even a short-lived 'gag' order in a case of widespread concern to the community constitutes a substantial prior restraint and causes irreparable injury to First Amendment interests as long as it remains in effect.").

74. Whether the chilling effect on the exercise of Plaintiff WRL's First Amendment rights is due to the interpretation and application of Wis. Stat. § 11.01(4) (Count I) or a separate policy of the State to burden the exercise of constitutional rights (Count II), the ability of Wisconsin electors, under Wis. Stat. § 11.66, to go into state court and enjoin issue advocacy groups from distributing materials which "influence elections" unless they register as "committees" is an unconstitutional prior restraint on the ability to engage in protected speech.

75. Under the authority of Wisconsin election law, agents of the State have gone to state court and obtained injunctions against organizations similar to Plaintiff WRL

from publishing and distributing issue advocacy materials without registering as a "committee." This constitutes unconstitutional prior restraint.

WHEREFORE, Plaintiff WRL respectfully prays the Court to:

(1) Declare that the ability of electors under Wis. Stat. § 11.66 or the ability of agents of the State under Wis. Stat. § 11.60 to go into state court and enjoin issue advocacy groups such as WRL from distributing materials which "influence elections" unless they register as "committees" is an unconstitutional prior restraint on the ability to engage in protected speech;

(2) Prohibit, by way of preliminary and permanent injunction, the Defendants from employing Wis. Stat. §§ 11.60 or 11.66 to impose a prior restraint against WRL or against its agents, officers, and employees;

(3) Grant it its costs of this action, including reasonable attorney's fees, pursuant to 42 U.S.C. Wis. Stat. § 1988 and any other applicable authority; and

(4) Grant it such other relief as may be just and equitable.

VIII.

COUNT V

76. The Plaintiff realleges the preceding paragraphs.

77. The "mere fact that an entity is a corporation does not remove its speech from the ambit of first amendment." *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652, 657 (1990). This is particularly true if the entity is a

not-for-profit corporation which is organized so that it does not pose a risk of corrupting the political process through "the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form and that have little or no correlation to the public's support for the corporation's political ideals." *Id.* at 660. Accordingly, in *Federal Election Commission v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238 (1986) (hereafter "MCFL"), the Supreme Court held that limits on independent expenditures made by certain not-for-profit corporations violate the First Amendment. Specifically, a statute may not prohibit not for profit corporations which are organized so that they do not pose a risk of corrupting the political process from making independent expenditures.

78. As noted, WRL spends money on putative independent expenditures by publishing and distributing a newspaper to the general public which, in some editions, contains announcements [sic] candidate endorsements.

79. However, and as also noted, under Wis. Stat. § 11.38(1), a corporation, may not make independent expenditures concerning candidates. If WRL violates this section, it will be subject to civil and criminal penalties under Wis. Stat. §§ 11.60 and 11.61, respectively. Because of these penalties, and the concomitant time and expense from having to defend itself in state court or administrative actions for violating Wis. Stat. § 11.38(1), WRL will cease publishing editions of its newspaper which contain announcements of endorsements; it will not place other types of putative express advocacy in editions of its newspaper, and it will not spend money on other types of

putative express advocacy, although it intended and would like to do so.

80. Because Wis. Stat. § 11.38(1) does not contain an exception for independent expenditures made by those not-for-profit corporations, such as WRL, which are organized and operated so that they pose no risk of corrupting the political process by making such expenditures, it is overbroad.

81. This corporate prohibition on independent expenditures is substantially overbroad because it prohibits all not-for-profit corporations from making any independent expenditures, *Broadrick v. Oklahoma*, 413 U.S. 601, 615 (1973); as a result, it is unconstitutional on its face.

82. In addition, because WRL is organized so that it will not corrupt the political process, the statute is unconstitutional as applied to it.

83. In the alternative, if Wis. Stat. § 11.38(1) is not unconstitutionally overbroad, then it is unconstitutionally vague both because it does not provide "fair notice" of what conduct is illegal, *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972), and it vests the Defendants with the discretion to enforce the law in an arbitrary and discriminatory manner. *Kolender v. Lawson*, 461 U.S. 352, 357 (1983). In other words, if this statute does not prohibit WRL from making independent expenditures, i.e., if it is not overbroad, then it is worded so vaguely that it appears to do so and would confer upon the Defendants the discretion to enforce the statute against it for engaging in protected expression.

WHEREFORE, Plaintiff WRL respectfully prays the Court to:

(1) Declare Wis. Stat. § 11.38(1) unconstitutional on its face and as applied to it;

(2) Prohibit, by way of preliminary and permanent injunction, the Defendants, their agents, and successors from enforcing Wis. Stat. § 11.38(1) against WRL, as well as its agents, officers, and employees;

(3) Grant it its costs of this action, including reasonable attorney's fees, pursuant to 42 U.S.C. § 1988 and any other applicable authority; and

(4) Grant it such other relief as may be just and equitable.

IX.

COUNT VI

84. The Plaintiff realleges the preceding paragraphs.

85. Wisconsin also defines an act to be for a "political purpose" when "it is done . . . for the purpose of influencing the recall from or retention in office of an individual holding a state or local office, [or] for the purpose of payment of expenses incurred as a result of a recount at an election." Wis. Stat. § 11.01(16).

86. As noted, the Board's legal counsel has advised WRL that it could not spend money on communications concerning the recall of a current officeholder after the filing of a statement of an intent to circulate a petition for recall. At that time, WRL would be prohibited from

engaging in *any discussion* concerning the possible recall of a named incumbent *until it registers as a "committee."*

87. Since a statement of an intent to circulate a petition for recall was filed on April 4, 1997, and while WRL would like to spend money on both issue advocacy and what may be considered express advocacy communications concerning the recall, WRL is currently prohibited from doing so because it does not want to register as a "committee" and does not want to run afoul of Wisconsin law – with the resultant civil and criminal penalties and the attendant time and expense of having to defend itself in state court and administrative proceedings.

88. Because Wis. Stat. § 11.01(4) deems organizations which make disbursements greater than $25 to "influence the recall from" office to be "committees," it is overbroad for sweeping in issue advocacy groups, i.e., for being predicated on issue, rather than express, advocacy.

89. Wis. Stat. § 11.01(4) is also substantially overbroad, *Broadrick v. Oklahoma*, 413 U.S. 601, 615 (1973), because it defines all issue advocacy groups which spend over $25 to "influence the recall from" office to be "committees." As a result, the statute is unconstitutional on its face.

90. In the alternative, if Wis. Stat. § 11.01(4) is not unconstitutionally overbroad, then it is unconstitutionally vague both because it does not provide "fair notice" of what conduct is illegal, *Grayned v. City Of Rockford*, 408 U.S. 104, 108 (1972), and it vests the Defendants with the discretion to enforce the law in an arbitrary and discriminatory manner. *Kolender v. Lawson*, 461 U.S. 352, 357 (1983).

WHEREFORE, Plaintiff WRL respectfully prays the Court to:

(1) Declare Wis. Stat. § 11.01(4) unconstitutional on its face;

(2) Prohibit, by way of preliminary and permanent injunction, the Defendants, their agents, and successors from enforcing Wis. Stat. § 11.01(4) against WRL as well as against its agents, officers, and employees;

(3) Grant them their costs of this action, including reasonable attorney's fees, pursuant to 42 U.S.C. § 1988 and any other applicable authority; and

(4) Grant them such other relief as may be just and equitable.

X.

COUNT VII

91. The Plaintiff realleges the preceding paragraphs.

92. Under Wis. Stat. § 11.01(4), WRL is a "committee" because it make [sic] disbursements greater than $25 during a calendar year to "influence the recall from" office to be "committees," even though its major purpose is not to elect or nominate candidates for public office.

93. Because Wis. Stat. § 11.01(4) deems organizations which make disbursements greater than $25 to "influence the recall from" office to be "committees," it is overbroad for sweeping in issue advocacy groups, i.e., groups the major purpose of which is not the election or nomination of candidates.

94. Because Wis. Stat. § 11.01(4) defines as PACs such groups, it is substantially overbroad. *Broadrick v. Oklahoma*, 413 U.S. 601, 615 (1973). As a result, the statute is unconstitutional on its face.

95. In the alternative, if Wis. Stat. § 11.01(4) is not unconstitutionally overbroad, then it is unconstitutionally vague both because it does not provide "fair notice" of what conduct is illegal, *Grayned v. City Of Rockford*, 408 U.S. 104, 108 (1972), and because it vests the Defendants with the discretion to enforce the law in an arbitrary and discriminatory manner. *Kolender v. Lawson*, 461 U.S. 352, 357 (1983).

WHEREFORE, Plaintiff WRL respectfully prays the Court to:

(1) Declare Wis. Stat. § 11.01(4) unconstitutional on its face;

(2) Prohibit, by way of preliminary and permanent injunction, the Defendants, their agents, and successors from enforcing Wis. Stat. § 11.01(4) against WRL, as well as against its agents, officers, and employees;

(3) Grant them their costs of this action, including reasonable attorney's fees, pursuant to 42 U.S.C. § 1988 and any other applicable authority; and

(4) Grant them such other relief as may be just and equitable.

XI.

COUNT VIII

96. The Plaintiff realleges the preceding paragraphs.

97. In the alternative, then, if Wis. Stat. § 11.01(4) does not define Plaintiff WRL as a "committee" because it spends money to influence the recall of current officeholders, then agents of the State have interpreted and applied this statute to define WRL as a "committee" for engaging in such speech once a statement of intent to circulate a petition for recall is filed. Because of this official policy of the State, this policy may be enjoined if it violates the federal constitution. *Pembaur v. Cincinnati*, 475 U.S. 469, 479-80 (1986); *see also City of Oklahoma City v. Tuttle*, 471 U.S. 808, 823-24 (1985).

98. Because, as noted, it is unconstitutional to predicate a registration requirement on issue advocacy and regardless of an organizations major purpose, *Buckley*, 424 U.S. at 79, this policy is unconstitutional and should be declared unlawful and enjoined.

WHEREFORE, Plaintiff WRL respectfully prays the Court to:

(1) Declare as unconstitutional the official policy of the State of Wisconsin that once a statement of intent to circulate a petition for recall is filed, groups which spend more than $25 to influence the recall of current officeholders are committees which must register;

(2) Prohibit, by way of preliminary and permanent injunction, the Defendants, their agents, and successors from enforcing this policy against WRL, as well as against its agents, officers, and employees;

(3) Grant it its costs of this action, including reasonable attorney's fees, pursuant to 42 U.S.C. § 1988 and any other applicable authority; and

(4) Grant it such other relief as may be just and equitable.

XII.

COUNT IX

99. The Plaintiff realleges the preceding paragraphs.

100. Whether the chilling effect on the exercise of Plaintiff WRL's First Amendment rights is due to the interpretation and application of Wis. Stat. § 11.01(4) in the context of recall elections (Count VIII) or a separate policy of the State to burden the exercise of constitutional rights (Count XI), the ability of Wisconsin electors, under Wis. Stat. § 11.66, to go into state court and enjoin issue advocacy groups, such as WRL, from making disbursements concerning a recall election once a statement of intent to circulate a petition for recall is filed, unless these groups register as "committees," is an unconstitutional prior restraint on the ability to engage in protected speech.

101. Under Wis. Stat. § 11.60 agents of the State could go into state court and enjoin Plaintiff WRL from making disbursements concerning a recall election once a statement of intent to circulate a petition for recall is filed unless it registers as a "committee." This would also be an unconstitutional prior restraint.

WHEREFORE, Plaintiff WRL respectfully prays the Court to:

(1) Declare that the ability of electors under Wis. Stat. § 11.66 or the ability of agents of the State under Wis. Stat. § 11.60 to go into state court and enjoin issue advocacy groups, such as WRL, from making disbursements concerning a recall election once a statement of intent to circulate a petition for recall is filed, unless these groups register as "committees," is an unconstitutional prior restraint on the ability to engage in protected speech.

(2) Prohibit, by way of preliminary and permanent injunction, the Defendants from employing Wis. Stat. §§ 11.60 or 11.66 to impose such a prior restraint against WRL or against its agents, officers, and employees;

(3) Grant it its costs of this action, including reasonable attorney's fees, pursuant to 42 U.S.C. § 1988 and any other applicable authority; and

(4) Grant it such other relief as may be just and equitable.

XIII.

COUNT X

102. The Plaintiff realleges the preceding paragraphs.

103. As noted, under Wisconsin election law, a registrant is required to "make full reports . . . of all contributions received, contributions or disbursements made, and obligations incurred." Wis. Stat. § 11.06(1). However, if "a disbursement is made or obligation incurred by an individual other than a candidate or by a committee or

group which is not primarily organized for political purposes, and the disbursement does not constitute a contribution to any candidate or other individual, committee or group, the disbursement or obligation is required to be reported only if the purpose is to expressly advocate the election or defeat of a clearly identified candidate or the adoption or rejection of a referendum." Wis. Stat. § 11.06(2).

104. Because WRL is not primarily organized for political purposes, and once the ban on corporate disbursements in Wis. Stat. § 11.38(1) is enjoined, it would have to report the monies spent on the putative express advocacy in editions of the newspaper it publishes. Because of the burdens on WRL from having to report such monies, it does not wish to do so. But because of the civil and criminal penalties (discussed, *infra*) for violating Wis. Stat. § 11.06, as well as the time and expense of having to defend against state court and administrative actions, if it does file such reports, WRL will cease publishing editions of its newspaper which contain putative express advocacy.

105. The reporting requirements in Wis. Stat. § 11.06 is unconstitutional as applied to the expenditures WRL makes on the putative express advocacy contained in its newspapers. *Cf. Federal Election Commission v. Massachusetts Citizens For Life, Inc.*, 479 U.S. 238 (1986); *Miami Herald Publishing Company v. Tornillo*, 418 U.S. 241 (1974).

WHEREFORE, Plaintiff WRL respectfully prays the Court to:

(1) Declare Wis. Stat. § 11.06 unconstitutional as applied to the expenditures WRL makes on the putative

express advocacy contained in various editions of its newspaper;

(2) Prohibit, by way of preliminary and permanent injunction, the Defendants, their agents, and successors from enforcing Wis. Stat. § 11.06 against WRL, as well as its agents, officers, and employees, for the expenditures WRL makes on the express advocacy contained in various editions of its newspapers;

(3) Grant it its costs of this action, including reasonable attorney's fees, pursuant to 42 U.S.C. § 1988 and any other applicable authority; and

(4) Grant it such other relief as may be just and equitable.

VERIFICATION

I affirm under the penalties for perjury that the allegations of fact herein are true and correct to the best of my knowledge and belief.

WISCONSIN RIGHT TO
LIFE, INC.

April 14, 1997
Date

BY: /s/ Barbara L. Lyons
Barbara L. Lyons,
Executive Director

Respectfully submitted,

/s/ Michael A. Bowen
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EXHIBITS

A: *Wisconsin Right to Life, Inc. Articles of Incorporation*

B: *Chapter 11, Campaign Finance*

C: *voter guides/scorecards*

D: *flyers*

E: *press releases*

F: *Statements Of Facts In Complaints Nos. 96-35, 96-37, 96-38, 96-39, 96-40, and 96-41 Before The Wisconsin State Election Board*

G: *Pleadings and Orders in Travis v. Americans For Limited Terms (No. 96-CV-2581), in State of Wisconsin ex rel.*

WMC Issues Mobilization Council, Inc., v. Circuit Court for Dayne County (No. 96-3133-W), and in State of Wisconsin ex rel. WMC Issues Mobilization Council, Inc., v. Circuit Court For Milwaukee County (No. 96-3139-W)

H: *Memorandum From George A. Dunst, Legal Counsel, To Members Of Wisconsin State Election Board, dated 3/13/97*

I: *Orders and Opinions of Wisconsin State Election Board in Complaints Nos. 96-35, 96-37, and 96-38*

J: *copies of WRL Newspaper*

K: *copes of WRL Newspaper*

L: *WRL Materials Pertaining To The Recall Of Senators Feingold & Kohl*

M: *Letters of 12/6/95 To Susan M. Armacost of WRL and of 6/16/95 To Vincent P. Lyles*

[Exhibits Omitted In Printing]